Supreme Court, U.S.
FILED
01-49 NOV 16 2000
OFFICE OF THE CLERK

NO. _____

In The

Supreme Court of the United States

HENRY LEE DENNIS,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

BARBARA CRAMPTON
Counsel of Record
505 Lamar Avenue
Wichita Falls, Texas 76307
Tel. No. (940) 723-9749

ROBERT ESTRADA
Of Counsel
1007 Eleventh Street
Wichita Falls, Texas 76307
Tel. No. (940) 723-9747

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QUESTIONS PRESENTED

1. Does the prosecution and punishment of one act as multiple offenses violate the Fifth Amendment Double Jeopardy Prohibition made applicable to the States by the Fourteenth Amendment?
2. Whether the Petitioner was impermissibly convicted and sentenced for four crimes for one offense?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Henry Lee Dennis, respectfully prays that a writ of certiorari issue to review the August 18, 2000, opinion of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit dated August 18, 2000, as yet unreported , is reprinted in the Petition Appendix ("App.") beginning at App. 1.

STATEMENT OF JURISDICTION

Petitioner seeks review of the Tenth Circuit Court of Appeals' Opinion dated August 18, 2000.The United States Supreme Court has jurisdiction to review cases from the Circuit Court of Appeals by virtue of 28 U.S.C. § 1254.

STATEMENT

This case presents the issue of Double Jeopardy in assessing multiple punishments for one offense that is barred by this Court under *Missouri v. Hunter* unless a "legislature specifically authorizes cumulative punishment under two statutes." 459 U.S. 359 (1983).

Likewise, the Tenth Circuit disregards its own rule of construction in interpreting another Act when articulating that inclusion of a prohibited conduct in subparts of single statute signaled the legislature did not intend to create separate offenses. *United States v. Johnson*, 130 F.3d 1420 (1997) (*citing United States v. Munoz-Romo*, 989 F.2d 7575 (5th Cir. 1993).

In lieu of *Johnson*, the lower court citing the *"Blockburger"* test, misapplied statutory construction in this case to distinguish between definitions of two isolated words, as opposed to identical "statutory elements." At the same time, the lower court complete disregarded the second

prong of *Blockburger*, whether one offense is a lesser-included offense of the other.

The point is that rather than charging the Applicant with one offense of trafficking by distributing, the state transformed one criminal episode into two primary offenses, trafficking by distribution and trafficking by possession. The maximum punishment authorized by the legislature, $100,000 in fines and two consecutive terms of 100 years confinement were assessed for each offense.

Then, contrary to the plain language of a tax statute, as to when and from whom tax liability is due and payable, the Petitioner was convicted of not one but two additional tax stamp offenses. The lower court substituted its derived intent for the plain language of the statute just as the lower court substituted derived intent for the express intent of the legislature.

Further, the tax stamp, as applied in this case, is wholly punitive in nature, the rare case that violates Double

Jeopardy. The lower court relies totally on cases where multiple punishments were not discussed to support its holding on the issues of Double Jeopardy.

Therefore, notwithstanding that the state conducted only one criminal trial, the ineffective assistance of counsel allowed the multiplicity of these separate charges that violated the protections against Double Jeopardy provided by the United States Constitution to trample well-established rights of the Petitioner.

Without intervention of reasonably professional counsel, as in this case, those constitutional protections presumed present in criminal proceedings are denied.

But on review, relying on the misapplication of the *"Blockburger"* test to isolate words rather than statutory elements or whether one offense may be considered a lesser-included offense, the Tenth Circuit affirms the multiple application of the trafficking statute by the lower court to

find the claim of ineffective assistance of counsel to be without merit.

For the same reason, the Tenth Circuit also rejects the issues that appellate counsel for the Applicant was ineffective in failing to raise these issues on direct appeal.

Sophistry is the only word adequate to describe the faulty premise that a suspect may distribute without the lesser included offense of possession with intent to distribute and that premise rests solely on the fact that the definitions of distribute and possession are different.

Rationalization is utilized to avoid well-established federal law, the required specificity within the statutes applied to support punishment for multiple crimes.

REASONS FOR GRANTING THE WRIT

1. **The Lower Court Violates Double Jeopardy by Creating Multiple Punishments for a Single Offense, Misapplying Statutory Construction and Definitions of Isolated Words Taken Out of Context to Disavow that Subparts of a Single Statute Are Intended to Identify Lesser Included Offenses or Different Methods By Which Violation of the Statute May Occur.**

2. **The Lower Court Violates Double Jeopardy By Failing to Require Express Provision Within the Statute that the Punishment Imposed Shall be in Addition to That Provided by Law for The Crime Committed.**

3. **The Tax Statute Is Punitive In Nature, and As Applied, The Lower Court By Inferring Intent to Punish a Different Offender Than Identified in the Tax Statute Violates Double Jeopardy.**

4. **Ineffective Assistance of Counsel During the Trial and Appellate Proceedings Resulted In Increased Punishment.**

This Petition results from the multiple convictions foisted upon the Petitioner in the instant case rising out of a single criminal episode.

The lower court acknowledges the two primary offenses for which the Petitioner was convicted "may have

occurred during a continuing course of conduct.[1] However, the lower court considers, the essentially inclusive acts of possession with intent to distribute and actual distribution to be only tangentially related.[2]

Double Jeopardy is the umbrella under which this Court has long interpreted multiple punishments for the same offense, also restricted by the Cruel and Unusual Punishments and Excessive Fines Clauses, as

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[1] App. 42.

[2] The means by which the lower court arrives at this conclusion whereby one can distribute without first possessing is questionable. One can only point out that the statute provides two methods to determine a 'trafficking' violation actual distribution or the intent to distribute (inferred, as authorized, from possession of a defined quantity).

unconstitutional, unless Due Process requirements have been met, i.e., express authorization by the legislature.

Double Jeopardy violations can occur when, as in this case, trial counsel ineffectively fails to take exception or object to the charge creating multiple offenses whereby the offender is convicted of not one but four separate offenses for a single criminal episode.

I. **The Court Failed to Apply Blockburger Properly and Disregarded Its Previous Holdings When Statutory Construction Applies to A Single Case.**

In determining that the district court had correctly applied the law of the land, the Tenth Circuit was inconsistent because it did not look to its prior holdings in making this determination. In *United States v. Johnson*, the lower court considered a single legislative enactment signaled by including all of the offenses in the subsections of the same statute, that it did not intend multiple punishments

for a single offense.[3] 130 F.3d 1420 (10th Cir. 1997) (*citing United States v. Munoz-Romo*, 989 F.2d 757 (5th Cir. 1993).

Because all of the primary offenses for which punishment was assessed were included in the subsections of the same statute, the Tenth Circuit failed to apply that rule of construction.

To effect uniformity, the Court should have determined whether Petitioner committed the offense at distinct and different times to permit punishment as separate offenses without offending constitutional prohibitions. *Id.*

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[3] The court in *Johnson* examined a Congressional enactment related to firearms offenses as it related to multiple prosecutions for the possession of single weapon interpreting Congress intended to describe only a single crime that could be committed by seven types of offenders.

But, the Tenth Circuit rejected the application of this "single criminal episode rule," when only a matter of minutes, if not moments, transpired and the difference in location was only a few feet between the first and second offenses charged.[4]

Instead, the lower court chose to apply a different rule of statutory construction from that of *Johnson*. This rule, announced in *"Blockburger*[5]*,"* applied to interpreting two separate statutes to determine whether a latter crime reflected identical statutory elements or a lesser-included offense of the other. In this case, we have only one statute that would signal the offenses identified therein were lesser-included.

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[4] App. 3.

[5] *Blockburger v. United States*, 284 U.S. 299 (1932).

The avoidance of uniform construction using *Blockburger* to interpret legislative intent of a single statute resulted in the irreconcilable conclusion that possession with intent to distribute was a separate offense rather than a different method by which violation of the trafficking statute could be punished.[6]

Such resolution, particularly where, as here, involving a single instance of wrong and unlike other post-event evidence cases involving multiple and continuing wrong,[7] cannot be viewed as other than a violation of the

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[6] The comparison of elements constituting distribution and possession "persuades us the Oklahoma legislature intended different offense and punishments for 'distribution' and 'possession' even though both are contained within the same provision of § 2-415." App. 20 (emphasis mine).

[7] *See* ; *United States V. Maxey,* 989 F.2d 303, 306-307 (9th Cir. 1993)) (interpreting two sales of PCP-laced cigarettes

prohibition against multiple punishments provided by the Double Jeopardy Clause, and *vis a vis*, the Cruel and Unusual Punishment Clause of the United States Constitution.[8]

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that occurred in the same state and county within twenty-four days of each other were separate offenses for purposes of Sections 924(e)(1)); *United States v. Kelley*, 981 F.2d 1464, 1473-74(5th Cir. 1993) (two deliveries of cocaine two weeks apart in different counties were separate offenses); *United States v. Samuels*, 970 F.2. 1312, 1315 (4th Cir. 1992) (two drug offenses one day apart were separate offenses); *United States v. Roach*, 958 F.2d 679, 683-84 (6th Cir. 1992) (three drug sales on March 11, 12, and 26, 1981, were separate offenses); *United States v. McDile*, 914 F.2d 1059, 1061-62 (8th Cir. 1990) (sales of drugs on September 15, November 15, 17, and 23, 1983, were separate offenses).

[8] *See also*, Okla. Stat. Tit. 21 § 11. App. 39-40.

II. The State Tax Statute applied in the instant case fails to expressly provide that the punishment imposed for it "shall be in addition to any punishment provided by law for the crime committed," therefore the Tenth Circuit misapplied the statute to affirm the multiple punishments for one offense.

"Whether the Oklahoma legislature intended for multiple punishments to be imposed pursuant to Okla. Stat. Tit. 63, sec. 2-415(B)(1) is an issue not previously addressed by the Oklahoma courts."[9] The Tenth Circuit again elected to interpret the intent of the legislature rather than requiring compliance of the district court with the ruling of the Supreme Court in *Missouri v. Hunter* that the provision for cumulative punishment imposed by the district court must be expressly provided by the legislature. 459 U.S. 359 (1983).

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[9] App. 15.

And once again seeking to ascertain the intent of the legislature, the lower court acknowledges its interpretations rests solely on one prior decision of an Oklahoma court where the specific legislative authority necessary to impose multiple punishments was not discussed.[10]

The lower court also refers without citation to this Court's decision in "*Kurth Ranch*" in support of its holding. As in the state case, the lower court disregards that the Court did not "comment on the permissibility of 'multiple punishments' imposed in the same proceeding." *Mont. Dept. of Rev. v. Kurth Ranch*, 511 U.U. 767, 783 fn. 21 (1994).

The Tenth Circuit correctly recognized that compliance with the tax stamp requirements does not insulate a dealer

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[10] The lower court places limited reliance on the Supreme Court decision , in *"Kurth Ranch"* [no cite] that when two punishments are addressed in one proceeding, no double jeopardy violation arises.

who posses or distributes a taxable substance like cocaine base from prosecution or conviction under Oklahoma law.

However, Okla. Stat. Tit. 68 Sec. 450(C) contains no express provision that the punishment therein shall be in addition to that provided by law. Rather the statute states, "Nothing in this Act may in any manner provide immunity for a dealer from criminal prosecution pursuant to Oklahoma law."[11]

Under the plain language construction of the statute and lacking specific authorization for cumulative punishment under two statutes, reasonable jurists would disagree as to whether the lower court's assessment that the legislature intended the punishment for the trafficking offense to be cumulative to the punishment for failing to affix a tax stamp to be "readily apparent."[12]

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[11] App. 35.

[12] Id.

Arguably, the denial of immunity for criminal acts, permits prosecutorial discretion in electing to charge the dealer under the Tax Stamp Act in a civil proceeding, provided the statute is not punitive in nature, or in criminal proceedings. But clearly, the language fails to specifically provide for multiple prosecutions under two statutes as required in *Hunter*.

Yet, in the instant case, additional punishments, enhanced by the multiple convictions for the primary offense imposed two additional ten year sentences of confinement.[13]

Such resolution, obfuscates, the denial of Due Process by the lower court's quantum leap from the legal requirement as interpreted by the Supreme Court of express legislative intent to substitute judicial interpretation.

III. The State Tax Statute Was Misapplied by the Tenth Circuit in the Instant Context and Punitive in Nature.

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[13] App. 4 and 48. *See also, Missouri v. Hunter*, supra.

The multiple punishment of the Petitioner under the Oklahoma Tax Statute violates Due Process and Double Jeopardy because Okla. Stat. Tit. 68 Sec. 450.3, only states the legislative intent that a fine and punishment be due and payable from the dealer in possession immediately upon receipt within the state of the prohibited contraband.

The Manner and payment of tax under Sec. 450.3 as articulated and emphasized by the lower court, App. 25 states;

> "A. The tax levied by Section 2 of this act... shall be paid by affixing stamps in the manner and at the time herein set forth.
>
> When a dealer purchases, acquires, transports, *or imports into this state* a controlled dangerous substance on which a tax is levied by Sec. 2 of this act, *the dealer shall have the stamp affixed on the controlled dangerous substance immediately after the receiving the controlled dangerous substance.* Each stamp may be used only once.
>
> Taxes imposed upon controlled dangerous substances ... *are due and payable immediately upon acquisition or possession of a controlled dangerous substance in this state by a dealer.*

> B. It is the intent and purpose of this act that no dealer shall possess any controlled dangerous substance upon which a tax is imposed by Section 2 of this act unless the tax has been paid on the controlled dangerous substance *as evidenced by a stamp* issued by the Commission."

Since the plain language of the Act shows that a dealer is required to affix the necessary number of stamps on the rock cocaine ***immediately upon importing into the state***, there was but a single violation of the drug stamp tax by the Petitioner.

Rather than a second tax assessment and offense against the Petition, the tax liability and duty to affix tax stamps imposed by the statute falls upon **purchase** to Mr. Shaw as the dealer who acquired or possessed the controlled substance.

The logic is obvious. By making the dealer liable upon the acquisition or possession of a controlled dangerous substance, any argument as to who is liable for the taxes is

clear. Whether purchased in the state, brought into the state, grown, or found by the side of the road ends, the tax liability is assessed against the dealer in possession of the goods.

The court erroneously interprets Sec. 450.8(B) to reflect a clear legislative intent to authorize punishment under the tax statute for distribution rather than purchase, acquisition or possession within or transporting into the sstate as expressly provided under Okla. Stat. Tit. 68 Sec. 450.3.

Further, the tax statute, as applied, is punitive. The factors considered in determining the nature of a tax statute; an excessive fine is provided, [14] 4.4 times the market value

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[14] See *Mont. Dept. of Rev. v. Kurth Ranch*, 511 U.U. 767, 775 & 779 fn. 17 (1994).

of the goods taxed;[15] imprisonment;[16] enhancement; and, as adopted, a violate the constitutional protections against self-incrimination, all evidence the tax statute to be punitive in nature.

IV. But for Ineffective Assistance of Counsel at Trial and On Appeal, the Outcome of the Punishment Phase Would Probably Have Been Different.

Petitioner submits that his confinement is unlawful in that both trial and appellate counsel failed to prepare by investigating facts and controlling law, and that but for the

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[15] It is noted that a tax was not even assessed in this case. *But see,* Okla. Stat. Tit. 68 § 450.2 (requiring a tax of $200 per gram or portion of a gram of controlled dangerous substance) App. 27. *See also,* "Mr. Shaw gave Mr. Dennis $450 in exchange for a large, ten-gram rock of 'cocaine base". . . as evidence of market value. App. 3.

[16] *See, Kurth,* 511 U.S. at 775

ineffective assistance of counsel, it is reasonably probable that the outcome of the punishment phase of the Applicant's trial would have been different, *i.e.* a lesser punishment would have been assessed. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

None of the protections provided under criminal procedures that are embodied in the Bill of Rights were invoked at trial or raised on appeal denying the Petitioner his rights under the Sixth Amendment of the United States Constitution.

There was no sound strategic basis for counsel's waiver of protections, if a strategy existed at all, as reflected by counsel's failure to raise the issues addressed above as reflected in state statutes prosecuted or available[17] or raise the issues of constitutional protections of Due Process and Equal Protection or against Cruel and Unusual Punishment

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[17] For example, Okla. State. Tit. 21, Sec. 11.

and Excessive Fines under Fifth and Eighth Amendments, as applied to the states under the Fourteenth Amendment to the United States Constitution.

CONCLUSION

Head shaking, if not professional outrage, should accompany the realization of the denial of the fundamental fairness and constitutional rights present in this case.

The inescapable conclusion is that the law, as applied by the court below, repeatedly violates the Double Jeopardy, as well as Due Process and Equal Protection Clauses of the Constitution.

That being so, the Tenth Circuit was mistaken.

More importantly, this case reflects an unexcused extreme in the application of multiple punishments whereby one offense becomes four, not from ambiguity, but rather from failure of the lower court to apply the law of the land, choosing instead to interpret as needed even when express intent is clear or express intent is required.

As such, this case offers a remarkable opportunity not only to correct a grave injustice, but to set the record straight with regard to multiple punishments, especially

those involving tax statutes. T' erefore, this case should be accepted for plenary review.

Dated: Wichita Falls, Texas, January 29, 2001.

Respectfully submitted,

Barbara C. Crompton
BARBARA CRAMPTON
Attorney at Law
505 Lamar Avenue
Wichita Falls, Texas 76307
Telephone: (940) 723-9749

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

HENRY LEE DENNIS Petitioner-Appellant, v. DAYTON POPPEL; JAMES L. SAFFLE Respondents-Appellees.	No. 99-6294

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. 98-CV-335-A)

Mac Oyler, Oklahoma City, Oklahoma, for Petitioner-Appellant

Lori S. Carter (W.A. Drew Edmondson, Attorney General, with her on the brief),
Assistant Attorney General, Oklahoma City, Oklahoma, for Respondents-
Appellees.

Before **BRORBY, McKAY** and **BRISCOE,** Circuit Judges.

BRORBY, Circuit Judge.

Appellant Henry Lee Dennis, an Oklahoma state prisoner, appeals an order of the district court denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Mr. Dennis' appeal centers on his contention the State of Oklahoma impermissibly tried and convicted him of four offenses stemming from a single transaction involving the same rock of cocaine, in violation of the Double Jeopardy Clause and an Oklahoma statute prohibiting multiple punishments for a single act. We exercise jurisdiction pursuant to 28 U.S.C. § 2253 and affirm.

I. FACTUAL BACKGROUND

The facts surrounding Mr. Dennis' sale and possession of a controlled dangerous substance are undisputed. County and city enforcement officials involved in an undercover narcotic investigation used an informant, Charles Shaw, to arrange a drug deal with Mr. Dennis. Under the officers' supervision, Mr. Shaw contacted Mr. Dennis in Vernon, Texas, and arranged to meet him at a designated place in Frederick,

Oklahoma, to purchase "a half" or one-half ounce of rock cocaine. At the designated meeting spot, Mr. Shaw gave Mr. Dennis $450 in exchange for a large, ten-gram rock of "cocaine base" scored into four sections. After selling the rock cocaine to Mr. Shaw, Mr. Dennis drove away. Officers immediately followed Mr. Dennis' vehicle and pulled him over. In Mr. Dennis' vehicle, officers discovered two rocks consisting of 20.7 grams of "cocaine base" wrapped in a cellophane package. Each piece was scored into four sections. Mr. Dennis' vehicle also contained a knife with a blackened edge, which an officer testified Mr. Dennis probably heated to score the rock cocaine into multiple pieces for sale. Neither the rock cocaine sold to Mr. Shaw nor that found in Mr. Dennis' vehicle had tax stamps affixed.

A jury convicted Mr. Dennis of two counts of trafficking in illegal drugs, under Okla. State. Tit. 63, § 2-415, and set his punishment at life in prison and a $100,000 fine for each count. The jury also convicted him of two counts of

possession of cocaine base without proper tax stamps affixed, under the Oklahoma Controlled Dangerous Substance Tax Act, Okla. Stat. Tit. 68 §§ 450.1-450.9, setting his punishment at ten years in prison for each count. Based on the jury's recommendation, the trial court sentenced Mr. Dennis to two terms of life in prison together with two $100,000 fines, and two ten-year sentences-all to run consecutively.

II. PROCEDURAL BACKGROUND

The Oklahoma Court of Criminal Appeals affirmed Mr. Dennis' conviction on direct appeal. Thereafter, Mr. Dennis unsuccessfully sought state habeas post-conviction relief at the district and appellate court levels. Following his unsuccessful state litigation, Mr. Dennis filed his federal habeas corpus petition raising eight grounds for habeas relief. Mr. Dennis based six of his claims on double jeopardy or related grounds. The thrust of these claims centered on his suggestion he can only receive one conviction, not four

convictions, for his activities involving the same rock of cocaine.[1]

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[1] Specifically, Mr. Dennis claimed:

1) a double jeopardy violation for receiving two convictions for the same drug trafficking offense;
2) a double jeopardy violation for receiving two convictions for failing to purchase and affix tax stamps, even though Okla. State. Tit. 68 § 450.3 requires only one tax stamp on the entire quantity of rock cocaine;
3) a double jeopardy violation for receiving convictions for the "lesser included offense" of drug trafficking when he already was convicted for the offense of possession of rock cocaine without proper tax stamps;
4) a violation of Okla. Stat. Tit. 21, § 11, which prohibits punishment of one illegal act under more than one statutory penalty provision;

The district court referred Mr. Dennis' petition to a magistrate judge who recommended denial of Mr. Dennis' petition. In making this recommendation, the magistrate judge began by reviewing the procedural disposition of each

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5) a denial of his due process and equal protection rights based on the state court's failure to apply § 11; and

6) invalid convictions based on multiple punishments for offenses that should have been merged;

and in addition to his double jeopardy claims, Mr. Dennis also claimed:

7) a due process and equal protection violation based on the vagueness of Okla. Stat. Tit. 63, § 2-415, which calls for enhanced penalties for certain quantities of "cocaine base" as opposed to greater quantities of "cocaine"; and

8) ineffective assistance of trial and appellate counsel for failing to raise the seven other underlying claims either at trial or on direct appeal.

of Mr. Dennis' claims. First, the magistrate judge determined Mr. Dennis raised only two of the eight claims in his direct state appeal.[2] As to the remaining six issues, the magistrate judge determined Mr. Dennis raised them for the first time in his state application for post-conviction relief. The magistrate judge noted the Oklahoma Court of Criminal Appeals denied Mr. Dennis post-conviction relief in a summary decision, rejecting two of his claims under the principles of *res judicata* and five of his claims for procedural default. However, the Oklahoma court did consider and reject Mr. Dennis'

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[2] The two issues Mr. Dennis previously raised included claims of: 1) a double jeopardy violation because he was convicted for possession of rock cocaine without affixed stamps when he already was convicted for trafficking the same cocaine, and 2) a violation of his due process and equal protection rights due to the vagueness of § 2-415.

ineffective assistance claim on the merits, holding he failed to present a claim constituting a "dead bang winner."

After determining Mr. Dennis must show cause for his state procedural default and actual prejudice therefrom, the magistrate judge proceeded to the merits of Mr. Dennis' claims based on his ineffective assistance of counsel claim, recognizing the ineffective assistance claim may constitute cause for procedural default in state court. Following a determination Mr. Dennis' underlying claims lacked merit, the magistrate judge held no prejudice resulted from Mr. Dennis' counsel's failure to raise them either at trial or on direct appeal. After reviewing Mr. Dennis' objections to the magistrate judge's determinations, the district court adopted the magistrate judge's Report and Recommendation, denied Mr. Dennis' petition for a writ of habeas corpus, and denied his request for a certificate of appealability.

III. DISCUSSION

On Appeal, Mr. Dennis raises the same eight issues addressed by the district court and requests a certificate of appealability for the purpose of reviewing the merits of his appeal. In order for this court to grant a certificate of appealability and proceed to the merits of Mr. Dennis' appeal, he must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 225(c)(2). Where, as here, the "district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate reasonable jurists would find the district court's assessment of the constitutional claims debateable or wrong." *Slack v. McDaniel*, __ U.S. __, ___, 120 S. Ct. 1595, 1604 (2000). This court determined Mr. Dennis made the necessary showing, granted him a certificate of appealability to proceed on appeal, and ordered briefing on his claims. (We review Mr. Dennis' ineffective assistance of counsel claim and other

constitution or underlying claims, applying the following standard of review.

A. Standard of Review

Because Mr. Dennis seeks relief from a state conviction, he must show the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The district court determined Mr. Dennis' petition failed to meet this requirement. We review the legal basis for the district court's dismissal of Mr. Dennis' § 2254 petition *de novo*. *See Jackson v. Shanks*, 143 F.3d 1313, 1317 (10th Cir.), *cert denied*, 525 U.S. 950 (1998). We note the district court's denial of Mr. Dennis' petition stemmed, in part, from his procedural default in failing to raise six of his claims on direct appeal. Oklahoma law denying post-conviction relief on defaulted claims that could have been raised on direct appeal

provides and independent and adequate state ground permitting us to refuse to review such claims. *See Odum v. Boone*, 62 F.3d 327, 331 (10th Cir. 1995). This court will not perform a habeas review on issues defaulted in state court on independent and adequate state procedural grounds, unless Mr. Dennis can demonstrate "cause and prejudice or a fundamental miscarriage of justice." *Hickman v. Spears*, 160 F.3d 1269, 1271 (10th Cir. 1998) (relying on *Coleman v. Thompson*, 501 U.S. 722, 749-50 (1991). As the magistrate judge in this case ascertained, an ineffective assistance of counsel claim can serve as "cause" to excuse Mr. Dennis' procedural default on his other underlying or constitution claims. *See Coleman*, 501 U.S. at 753-54.

We determine whether Mr. Dennis has shown "cause" for his state procedural default on his other claims by assessing his ineffective assistance counsel claim. *Hickman*, 160 F.3d at 1273. Mr. Dennis' ineffective

assistance counsel claim "presents a mixed question of law and fact which w review de novo." *Id.* At 1273 (quotation marks omitted). To prevail on this claim, Mr. Dennis must show: "(1) that his counsel's performance fell below an objective standard of reasonableness and (2) that the deficient performance was prejudicial to his defense." *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 6949(1984)). Under *Strickland*, we need not separately determine the effectiveness of Mr. Dennis' counsel if we find the alleged deficiency did no prejudice Mr. Dennis. *See Brewer v. Reynolds*, 51 F.3d 1519, 1523 & n. 7 (10th Cir. 1995), *cert. denied*, 516 U.S. 1123 (1996). In order to determine if prejudice occurred, we review the merits of Mr. Dennis' underlying or constitutional claims. *See Banks v. Reynolds*, 54 F.3d 1508, 1514, 1516 (10th Cir. 1995). If those claims lack merit, Mr. Dennis cannot claim prejudice from his attorney's failure to raise them at trial or on direct state

appeal. *Id.* With these standards in mind, we proceed to examine the merits of each of Mr. Dennis' grounds for appeal.

B. Double Jeopardy and Related Claims

The crusx of Mr. Dennis' double jeopardy and related claims rests on the fact Mr. Dennis received four convictions for what he describes as a single act or transaction, occurring at the same time and place, and involving the same rock of cocaine, which he scored, broke apart and delivered a part of to Mr. Shaw. Mr. Dennis suggests he should be convicted of only one offense and not receive four convictions in violation of the Double Jeopardy Clause and Okla. Stat. Tit. 21, § 11, prohibiting multiple punishments. The arguments Mr. Dennis uses to support these claims are addressed below.

1. Two-Drug Trafficking Convictions

Mr. Dennis' most ardent argument surrounds his claim the two drug trafficking convictions violate the Double Jeopardy Clause because the state impermissibly charged him

with two "means" or "methods" of committing the same offense of "trafficking." In support of this argument, Mr. Dennis directs us to Okla. Stat. Tit. 63, § 2-415, which states drug trafficking is committed when individuals "[k]nowingly distribute, manufacture, bring into [the State of Oklahoma] or possess a controlled substance." Okla. Stat. Tit. 63, § 2-415. Mr. Dennis asserts this language presents four means or methods of "trafficking," *i.e.* 10 distributing, 2) manufacturing, 3) bringing into the state, or 4) possessing a controlled substance. Because the state charged and convicted him of "two means" of committing drug trafficking-possession and distribution-Mr. Dennis argues the state impermissibly convicted him of "two means" of committing the same offense in violation of the Fifth Amendment Double Jeopardy Clause. Ultimately, the question Mr. Dennis presents is whether § 2-415 deals with one offense or multiple offenses.

The Double Jeopardy Clause provides constitutional protections against multiple punishments for the same offense. *See Cummings v. Evans*, 161 F.3d 610, 614 (10th Cir. 1998), *cert. Denied*, 119 S. Ct. 1360 (1999). The question of whether Mr. Dennis' punishments are multiple in violation of the Double Jeopardy Clause is "essentially one of legislative intent." *Id.* (quoting *Ohio v. Johnson*, 467 U.S. 493, 499 (1984)). As the magistrate judge in this case aptly surmised, "[w]hether the Oklahoma legislature intended for multiple punishments to be imposed pursuant to Okla. Stat. Tit. 63, § 2-415(B)(1) is an issue not previously addressed by the Oklahoma courts."

Because the legislative intent is not clear on whether § 2-415 deals with one or multiple offense, we apply the "same evidence" test established in *Blockburger v. United States*, 284 U.S. 299 (1932), which the Oklahoma courts, when addressing similar double jeopardy determinations, have used

for guidance. For instance, in *Ferguson v. State*, 644 P.2d 121 ((Okla. Crim. App. 1982), a situation arose in which the defendant was convicted under Okla. Stat. Tit. 63 § 2-401 in two separate proceedings, for possession of marijuana with intent to distribute, and for unlawful delivery of marijuana. *Id.* At 122. The Oklahoma court, in determining whether § 2-401 dealt with one or multiple offenses, relied on the *Blockburger*" same evidence" test. *Id.* The "same evidence" test requires us to determine whether Mr. Dennis' convictions arising under the same statutory provision are based on offenses containing different or the same factual elements of proof. *Id.*; *see also Davis v. State*, 993 P.2d 124, 125 n. 1 (Okla. Crim. App 1999) (relying on *Mooney v. State*, 990 P.2d 875, 883 (Okla. Crim. App. 1999)).

This circuit has applied the same criteria when faced with double jeopardy issues.[3] Specifically, we and other circuits have performed the same or a similar analysis on a similar federal statute, 21 U.S.C. § 841(a), which makes it unlawful "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." In construing § 841(a), we determined "various stashes of [a] drug are considered separate where the evidence indicates they were intended for different purposes or transactions." *United States v. Johnson*, 97 F.2d 1360, 1374 (10th Cir. 1992), *cert. denied*, 506 U.S. 1070 (1993). *See also United States v. Randall*, 171 F.3d 195, 209-10 (4th

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[3] *See also Cummings*, 161 F.3d at 614. In *Cummings*,, unlike here, the double jeopardy issue concerned convictions under two statutory provisions, not one. Nevertheless, like here, we applied the *Blockburger* "same evidence" test to determine if each offense requires a proof of fact the other does not.

Cir. 1999) (holding the acts of "possession with intent to distribute" and "distribution" require different elements so no double jeopardy violation arises from conviction for two separate offenses contained in two separate clauses of the same statute) (relying on *United States v. Gore*, 154 F.3d 34, 45-57 (2d Cir. 1998); *United States v. Sepulveda*, 102 F.3d 1313, 1316 (1st Cir. 1996); *United States v. Tejada*, 886 F.2d 483, 490 (1st Cir. 1989); *United States v. Zabaneh*, 837 F.2d 1249, 1257 (5th Cir. 1988); *United States v. Brunty*, 701 F.2d 1375, 1381 & n.16 (11th Cir.), *cert denied*, 464 U.S. 848 (1983); *United States v. Winston*, 687 F.2d 832, 834 n. 1 (6th Cir. 1982); *United states V. Nelson*, 563 F.2d 928, 931 (8th Cir. 1977)).

In applying the "same evidence" test in this case, we must compare the acts of "distribution" and "possession" contained in the same provision of § 2-415 to determine if the legislature intended them to be different offenses. In other

words, we must determine if a difference exists in the proof of facts required to prove Mr. Dennis' "distribution" of the rock cocaine to Mr. Shaw compared to those facts required to prove his "possession" of the rock cocaine found in his car. *See Branch v. Mills*, 500 P.2d 590, 593 (Okla. Crim. App. 1972).

While the differences between "distribution" and possession" seem readily apparent, we nevertheless turn to Oklahoma law to address the issue. Both Oklahoma statutory and case law set out the elements for proving "distribution" and "possession" as contemplated by the legislature. While Okla. Stat. tit. 63, § 2-415 does not define "distribute," the definitions listed in Okla. Stat. Tit. 63 § 2-401 apply to the Uniform Controlled Dangerous Substances Act, including § 2-415. Under § 2-401(12), the word 'distribute' means to *deliver* ... in any manner other than to 'administer' or 'dispense,' which would encompass the *act of* selling a

controlled dangerous substance." *Starks v. State*, 523 P.2d 1108, 1110 (Okla. Crim. App. 1974) (emphasis added). On the other hand, "the elements of possession are (1) knowing and intnetional; (2) possession; ...(3) [if] a controlled substance." *White v. State*, 900 P.2d 982, 986 & nn. 5 & ^ (Okla. Crim. App. 1995) (relying, in part, on Okla. Stat. Tit. 63, § 2-415)). The Oklahoma Court of Criminal Appeals also has determined that "[p]ossession itself means that the possessor has 'dominion and control' over the possessed drug, that is, a right to control its disposition." *Miller v. State*, 579 P.2d 200, 202 (Okla. Crim. App. 1978).

A comparison of these elements leads us to conclude "distribution" and "possession" clearly require distinct and separate elements. *See Davis*,993 P.2d at 125, *Mooney*, 900 P.2d at 883. This persuades us the Oklahoma legislature intended different offense and punishments for "distribution" and "possession," even though both are contained within the

same provision of §2-415. Applying the specific elements of each offense to the case at hand, we acknowledge that at one point, Mr. Dennis obviously possessed all three pieces of the rock cocaine. However, at the time he separated, soled and delivered the ten-gram portion to Mr. Shaw, he no longer possessed or retained control over that quantity of rock cocaine, and instead committed the act of distribution in violation of the prohibition in § 2-415. When Mr. Dennis retained the other two pieces of rock cocaine in his vehicle and drove away, he knowingly and intentionally possessed a separate and distinct quantity of cocaine in violation of another separate prohibition in § 2-415.[4]

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[4] *Accord Ferguson v. State*, 644 P.2d at 122 (holding no double jeopardy violation occurs where separate caches of marijuana support one conviction for unlawful delivery and another conviction for possession with intent to distribute).

Mr. Dennis' reliance on *Watkins v. State*, 855 P.2d 141, 142 (Okla. Crim. App. 1992) to support his argument does not dissuade us from our holding. In *Watkins*, the defendant shipped a single package containing two types of controlled substances – cocaine and phencyclidine. 855 P.2d at 141. The State charged Mr. Watkins with two counts of conspiracy to distribute a controlled dangerous substance under Okla. Stat. Tit. 63 V 2-401(A)(1)[5] – one for the cocaine, and one for the phencyclidien. *Id.* Likewise, the State charged Mr. Watkins with two counts of possession with intent to distribute a controlled dangerous substance under § 2-401(A)(1)- again, one count for each type of drug. *Id.*

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[5] Section 2-401(A)(1) states, in part, that it is unlawful for any person:

To distribute, dispense, transport with intent to distribute or dispense, possess with intent to manufacture, distribute, or dispense, a controlled dangerous substance ....

Applying the "same evidence test," the Oklahoma Court of Criminal Appeals held a double jeopardy violation arose because § 2-401 did not distinguish between types or classifications of controlled dangerous drugs. *Id.* At 142. The court held the elements of each count of conspiracy is to distribute the type of drug. Similarly, the court determined the elements in each count of possession with intent to distribute a controlled substance were also the same and could not be distinguished by the type of drug. *Id.* at 141-142. In so holding, the Oklahoma court determined that while the legislature had the power to create separate penal provisions prohibiting different acts that may be committed at the same time, it had not exercised that power in passing § 2-401, as that statute applied only to a "controlled dangerous substance," and to to separate drugs included within a single package. *Id.* at 142.

As both the state and federal district courts in this case determined, *Watkins* is clearly distinguishable from the facts here. First, Mr. Dennis' convictions arose from violating § 2-415, under which, as previously discussed, the legislature clearly intended to penalize different acts based on different elements of proof. Second, Mr. Dennis' conduct satisfied all elements of both offenses- distribution and possession. Finally, law enforcement officers found the cocaine base rocks in separate locations, and not together in a single package. Consequently, at the time of arrest, unlike in *Watkins*, Mr. Dennis plainly committed two separate offenses of distribution and possession of rock cocaine under § 2-415, for which he received two convictions. Under the circumstances presented, Mr. Dennis fails to show the Oklahoma court's adjudication resulted in a contrary or unreasonable application of clearly established federal law, as determined by the Supreme Court. *See* 28 U.S.C. § 2254(d)(1).

2. Two Tax Stamp Convictions

In a related argument, Mr. Dennis suggests his conviction for two tax stamp offenses – one for failure to affix a tax stamp on the rock cocaine soled and another for failure to affix a tax stamp on the rock cocaine retained – violates his right against double jeopardy. In support, Mr. Dennis relies on Okla. Stat. Tit. 68 § 450.3, which requires a tax stamp to be immediately affixed at the time he brought the cocaine into the state. Specifically, § 450.3 states:

> A. The tax levied by Section 2 of this act... shall be paid by affixing stamps in the manner and at the time herein set forth.
>
> When a dealer purchases, acquires, transports, *or imports into this state* a controlled dangerous substance on which a tax is levied by Sec. 2 of this act, *the dealer shall have the stamp affixed on the controlled dangerous substance immediately after*

the receiving the controlled dangerous substance.

Each stamp may be used only once.

Taxes imposed upon controlled dangerous substances ... *are due and payable immediately upon acquisition or possession of a controlled dangerous substance in this state by a dealer.*

C. It is the intent and purpose of this act that no dealer shall possess any controlled dangerous substance upon which a tax is imposed by Section 2 of this act unless the tax has been paid on the controlled dangerous substance *as evidenced by a stamp* issued by the Commission."

Okla. Stat. Tit. 68, § 450.3 (emphasis added). In relying on this statute, Mr. Dennis is essentially contending only one tax stamp was required for the original quantity or rock of cocaine, before he divided it and sold part to Mr. Shaw.

If § 450.3 is read in isolation, it might lend support to Mr. Dennis' proposition that once he imported the one rock or quantity of cocaine into the state, only one tax stamp was

required. However, in order to ascertain the intent of the legislature, Oklahoma law requires us to look to each part of the Controlled Dangerous Substance Tax Act, Okla. Stat. tit. 68, §§ 450.1 – 450.9, under which Mr. Dennis was convicted. *See generally Lozoya v. State*, 932 P.2d 22, 28-29 (Okla. Crim. App. 1996).

The Oklahoma Controlled Dangerous Substance Tax Act clearly requires Mr. Dennis to pay a tax proportionate to the quantity of rock cocaine he imported into the state and immediately affix at least one tax stamp on receipt or importation of that cocaine. *See* Okla. Stat. tit. 68, §§ 450.2 and 450.3. However, the number of tax stamps required to be affixed depends on the quantity of drugs brought into the state. For example, § 450.2 requires a tax of $200 per gram or portion of a gram of controlled dangerous substance, and § 450.4(B) requires the stamps to be in denominations of $10. Arguably then, for one gram of rock cocaine, a dealer could

be required to obtain and affix twenty tax stamps.[6] Regardless of the exact number of stamps required, for the purposes of resolving the issue at hand, we can clearly determine from these statutes that more than one tax stamp was required for the thirty grams of rock cocaine Mr. Dennis brought into the

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[6] For the purposes of this appeal, we need not discern the meaning of these sections other than to determine whether Mr. Dennis was required to obtain more than one tax stamp for the ten grams he sold and the 20.7 grams he possessed, and to then affix the proper corresponding number of tax stamps to the portion he sold and the portion he retained. We leave the specifics of the exact number of tax stamps required for any portion of a controlled dangerous substance to the Oklahoma Tax Commission, which is required to promulgate rules and regulations for a uniform system of providing, affixing and displaying official tax stamps. *See* Okla. Sta. Tit. 68, § 450.4(A).

state. The remaining question is whether Mr. Dennis can be convicted of two counts of failing to apportion and affix those stamps proportionately to the rock cocaine he sold and that which he retained in his possession.

In addressing this issue, we note another relevant provision of the Act provides, in part:

> Any dealer manufacturing, *distributing*, producing, shipping, transporting, importing *or possessing* any controlled dangerous substance *without affixing the appropriate stamp*, upon conviction is guilty of a felony ....

Okla. Stat. Tit. 68, § 450.8(B) (emphasis added). In interpreting this provision, the magistrate judge simple determined it "creates a separate offense for failure to affix the requisite tax stamp with regard to each act identified therein. The legislative intent is clear that punishment for both offenses [of distribution and possession] is authorized." The state district court similarly held "there were separate and

distinct instances of 'distribution and/or possession of controlled dangerous substance without purchasing and affixing tax stamps.'" We agree.

Our reading of both §§ 450.3 and 450.8 convinces us the two statutes must be reconciled, and are not inconsistent. Specifically, § 450.3 deals primarily "when" (1) a dealer is required to pay taxes – namely, immediately on his possession or importation of the controlled dangerous substance, and (2) the tax stamp(s) would be affixed – namely, immediately on the dealer's possession of the substance. In contrast, § 450.8 identifies which acts require tax stamps, making it a felony offense for a dealer to fail to affix tax stamps when he transports, imports, manufactures, produces, distributes, or possesses a controlled dangerous substance. Applying both statutes to the case at hand, it is clear that under Okla. Stat. Tit. 68 § 450.3 Mr. Dennis was required to pay, based on total weight, a tax on the total quantity of rock cocaine he imported into the state, and to immediately affix the appropriate number

of tax stamps to that cocaine. In turn, under § 450.8, Mr. Dennis was required to affix the necessary number of tax stamps on the rock cocaine he sold to Mr. Shaw, *and* on the rock cocaine he retained. Under these circumstances, we conclude no double jeopardy violation arose in convicting Mr. Dennis of two tax stamp violations for failing to affix the necessary number of tax stamps to the rock cocaine distributed to Mr. Shaw and a separate, corresponding number of tax stamps to the rock cocaine Mr. Dennis retained and possessed. We hold the Oklahoma' court's adjudication of this issue was not contrary to or an unreasonable application of clearly established federal law, as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1).

3. Tax Stamp Violations for Trafficking of Same Cocaine

In this last Double Jeopardy Clause claim, Mr. Dennis argues that because he already received two tax-stamp convictions, he cannot also be convicted for what he describes as the "lesser included offense" of trafficking the same

cocaine. Mr. Dennis bases his argument on the fact the elements required for "trafficking" under § 2-415 are the same as for the offense of failing to affix the proper tax stamp under §§ 450.1 – 450.9, except the tax stamp offense requires the added element of requiring a tax stamp to be affixed. Because the elements are almost identical, Mr. Dennis claims the trafficking offenses are the "lesser included offense" of the tax stamp convictions. To support his argument, Mr. Dennis relies on *State v. Uriarite*, 815 P.2d 193, 195 (Okla. Crim. App. 1991), in which the Oklahoma Court of Criminal Appeals found the offense of "Unlawful Possession of CDS With Intent to Distribute" a lesser included offense of "Unlawful Possession of CDS With Intent to Distribute Within 1000 Fee of School Grounds" for double jeopardy purposes.

We agree the offense of "trafficking" under § 2-415 requires four elements, including: (1) knowing and intention (2) possession, distribution, manufacture or importation (3) of

five grams or more (4) of cocaine base. Okla. Stat. Tit. 63, § 2-415. *See also White*, 900 P.2d at 991. The offense of the failure to affix the appropriate tax stamp under § 450.8 requires proof of a fifth element – no tax stamp was "obtained, affixed and displayed." *White*, 900 P.2d at 991. While the elements are similar, our determination of whether Mr. Dennis' punishment under each statute constitutes multiple punishment for the same offense in violation of the Double Jeopardy Clause depends on the legislature's intent. *See Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983). If the legislature intended cumulative punishments for both violations and the sentences are imposed in the same proceeding, no double jeopardy violation arises. *Id.* This is true "regardless of whether [the] two statutes proscribe the same conduct under [the] *Blockburger* [test,]" which we apply when the legislative intent is unclear. *Id.*

We begin our analysis by noting the Oklahoma courts have not ruled on the Oklahoma legislature's intent with

respect to the two statutes at issue in this case. Our review of Oklahoma's Controlled Dangerous Substance Tax Act shows the legislature clearly intended the punishment for the statutory offense of failure to affix tax stamps to be in addition or cumulative to the punishment for the statutory trafficking offense found in the Oklahoma Uniform Controlled Dangerous Substance Act. *Compare* Okla. Stat. Tit. 68 §§ 450.2, 450.8 *with* Okla. Stat. Tit. 63, § 2-415. As the magistrate judge in this case pointed out:

> Section 450.1(2) of the Tax Act defines "dealer" as a person who "in violation of the Uniform Controlled Dangerous Substances Act manufactures, distributes, produces, ships, transports, or imports into Oklahoma or in any manner acquires or possess ... seven or more grams of any controlled dangerous substance...." This statutory language makes clear that when the legislature created additional penalties for the crime of failure to affix a drug tax stamp, the

> legislature recognized that the drug tax stamp requirement would apply against one who was also in violation of a separate criminal law....

Further confirmation that punishment for violation of the Tax Act was intended to be in addition to other punishments is found in § 450.8(C) which provides: "Nothing in this Act may in any manner provide immunity for a dealer from criminal prosecution pursuant to Oklahoma law." *See* Okla. Stat. Tit. 68 § 450.8(C). This section recognizes that compliance with the tax stamp requirements does not insulate a dealer who possess or distributes a taxable substance like cocaine base from prosecution or conviction under Oklahoma law.

Having reviewed the Oklahoma statutes at issues, we are convinced Mr. Dennis' convictions for trafficking and failing to affix tax stamps do not violate the Double Jeopardy Clause. While the elements for both offenses are similar, it is readily

apparent the legislature intended the punishment for the trafficking offense to be cumulative to the punishment for failing to affix a tax stamp.[7] Given this intent, we cannot conclude the two statutes at issue here are similar to the two statutes at issue in *Uriarite*. In *Uriarite*, the defendant was

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[7] Our decision comports with state decisions dealing with the same issue. In those cases, the state courts determined punishments for both failure to pay a drug tax and for delivery – or possession – related offenses did not violate the Double Jeopardy Clause because their respective state legislatures clearly intended the punishment for both offenses to be cumulative. *See State v. Detweiler*, 544 N.W.2d 83, 91-92 (Neb. 1996); *Anderson v. State*, 649 N.E.2d 1060, 1062-63 (Ind. Ct. App. 1995); *de La Garza v. State*, 898 S.W.2d 376, 377, 78 (Tex. App. 1995); *State v. Gallup*, 500 N.W.2d 437, 442-43 (Iowa 1993); *Ex parte Kopecky*, 821 S.W.2d 957, 959-61 (Tex. Crim. App. 1992).

convicted of unlawful possession of a controlled dangerous substance with intent to distribute under Okla. Stat. Tit. 63, § 2-401, and unlawful intent to distribute a controlled dangerous substance with intent to distribute within 1,0000 feet of a school ground under Okla. Stat. Tit. 63, § 2-401(A). 815 P.2d at 194-95. The Oklahoma court found the legislative intent was entirely unclear as to the application of one offense to the other. *Id.* at 195. In so finding, the court compared the elements of each offense and held a double jeopardy violation occurred because a single act could constitute a violation of both offenses. *Id.* In contrast, in this case the legislature clearly intended cumulative punishments to arise from both the tax stamp and the trafficking offense, and thus, the fact the elements of each offense are similar is immaterial to our double jeopardy determination.

Our discussion does not end here. In *White*, 900 P.2d 982, the Oklahoma Court of Appeals briefly addressed the double jeopardy consequences involved when a defendant is

convicted of the same two offenses involved in this case. In *White*, like here, the defendant was convicted of both a § 2-415 trafficking violation and a § 450 tax stamp violation. *Id.* at 985. While the Oklahoma court did not discuss the legislature's intent as to the cumulative nature of the punishments, it did explicitly hold that "here a defendant is punished for both failing to pay a drug tax and committing a drug offense, all in the same proceeding, no Double Jeopardy problem exists." *Id.* at 996.

We find the Oklahoma Court of Criminal Appeal's ruling in *White* consistent with the legislature's intent to create a cumulative punishment and the Supreme Court's decision in *Kurth Ranch* – to the extent it holds no double jeopardy violation arises when both punishments are addressed in one proceeding. For the same reasons, we conclude the Oklahoma court that adjudicated Mr. Dennis' case properly determined no double jeopardy issue arose when he received cumulative punishments in the same proceeding for the separate tax stamp

and trafficking offenses. We hold the Oklahoma court's adjudication on this issue comports with § 2254(d)(1) because it was not contrary to or an unreasonable application of federal law as determined by the Supreme Court.

4. Section 11 Violation

In a separate but related argument to his double jeopardy claims, Mr. Dennis argues his convictions violate Okla. Stat. Tit. 21, § 11, which prohibit multiple punishments for a single act. Mr. Dennis generally contends that in enacting § 11, the legislature intended to prevent the state from imposing multiple punishments under the "same statute" for a single act. He relies on *Hale v. State*, 888 P.2d 1027 (Okla. Crim. App. 1995), and cases following *Hale*, to support his position.

The pertinent part of § 11 states:

> [A]n act or omission which is made punishable in different ways by different provisions of this title may be punished under any of such provisions, ...but in no case can a criminal act

> or omission be punished under more than one section of law.

Okla. Stat. Tit. 21, § 11. The Oklahoma Court of Criminal Appeals determined § 11 "grants no greater protection than what is clearly spelled ouT in ...[its] language." *Davis*, 993 P.2d at 126. In so holding, the Oklahoma Court rejected the language in *Hale* which states that § 11 "is violated when a defendant is convicted of two offenses, one of "which is ...a mere means to some other ultimate objective, ... or ... merely a different incident or facet of some primary offense." *Id.* at 126. (quoting *Hale*, 888 P.3d at 1028). In rejecting *Hale's* "ultimate objective" or "primary offense" test, the Oklahoma Court stated:

> The proper analysis of a claim raised under Section 11 is then to focus on the relationship between the crimes.... One act that violates two criminal provisions cannot be punished twice, absent specific legislative intent.

> *This analysis does not bar the charging and conviction of separate crimes which may only tangentially relate to one or more crimes committed during a continuing course of conduct.*

Id. at 126-27 & n. 5 (emphasis added).

We are bound to accept the Oklahoma court's construction of its state statutes, including § 11. *See Missouri*, 459 U.S. at 368 (relying on *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974)). Applying the Oklahoma court's construction of § 11 to the case at hand, we have already ascertained Mr. Dennis' sale and distribution of rock cocaine to Mr. Shaw constitutes a separate and distinct crime from Mr. Dennis' possession of the remaining cocaine. Specifically, at the time Mr. Dennis sold and no longer retained control of the ten grams of rock cocaine, he committed the separate and distinct criminal offense of "distribution." In turn, the fact he retained the remaining rock cocaine evidences he separately committed the

criminal offense of "possession."[8] While these two acts or offenses may have occurred during a continuing course of conduct in which Mr. Dennis sold a portion of his rock cocaine while still possessing the remaining cocaine, the two acts are, at most, only tangentially related and thereby insufficient to cause a § 11 violation.

For these reasons, we reject Mr. Dennis' argument § 11 applies to his convictions. Because § 11 does not apply, we also reject his claim that the failure to apply § 11 violated his due process and equal protection rights. Accordingly, the Oklahoma court's adjudication of this issue comports with the requirements of 28 U.S.C. § 2254 (d)(1).

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[8] If instead, Mr. Dennis has sold the entire 30.7 grams to Mr. Shaw, he conceivably would have committed only the offense of distribution. However keeping some cocaine, Mr. Dennis also committed the separate and distinct criminal offense of possession.

5. Merger

Mr. Dennis claims "there was a merger of offenses under the facts and circumstances of the case that prohibits separate punishments, or at the minimum prohibits consecutive sentencing." Specifically, Mr. Dennis contends his offenses should have been merged because they stemmed from a single transaction or included underlying offense. Even if his actions constituted separate offenses, he contends the state court should have merged his offenses together at sentencing under Okla. Stat. Tit. 22 § 976,[9] and thus sentenced him to concurrent instead of consecutive sentences.

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[9] Section 976 states:

If the defendant has been convicted of two or more offenses before judgment on either, the judgment may be that the imprisonment upon any one may commence at the expiration of the imprisonment upon any other of the offenses. Provided, that the sentencing judge shall, at all times, have the

As previously determined, Mr. Dennis clearly was convicted of four separate and distinct offense so no double jeopardy implications arise for the purpose of merging his offenses. As to the sentencing issue, the application of Okla. Stat. Tit. 22 § 976 is a question of state law, not cognizable on federal habeas review. *See Handley v. Page*, 398 F.2d 351, 352 (10th Cir. 1968), *cert denied*, 394 U.S. 935 (1969). We afford wide discretion to the state trial court's sentencing decision, and challenges to that decision are not generally constitutionally cognizable, unless it is shown the sentence imposed is outside statutory limits or unauthorized by law. *See Haynes v. Butler*, 825 F.2d 921, 923-24 (5th Cir. 1987), *cert. denied* 484 U.S. 1014 (188); *see also Handley*, 398 F.2d at 352). Generally, our review of a sentence ends once we

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discretion to enter a sentence concurrent with any other sentence.

Okla. Stat. Tit. § 976.

determine the sentence is within the limitation set by statute. *See Vasquez v. Cooper*, 862 F.2d 250, 255 (10th Cir. 1988). In this case, the sentences Mr. Dennis received are within the statutory range of permissible punishment.[10] We find no merit in Mr. Dennis' merger arguments and find the state

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[10] The statutory sentences and fines Mr. Dennis received for his trafficking convictions are discussed in the following section. His two life sentences and $100,000 fines are within the statutory range for his trafficking convictions. As to his stamp tax convictions, § 450.8 sets punishment in prison for not more than five years. Okla. Stat. Titl 68, § 450.8. However, because Mr. Dennis was convicted of a prior felony, Okla. Stat. Tit. 21, § 51 applies and provides for "a term not exceeding ten (10) years." Therefore, Mr. Dennis' two ten-year sentences for failure to affix tax stamps are within the statutory range.

court's adjudication of these arguments satisfies the requirements of 28 U.S.C. § 2254(d)(1).

6. Vagueness of § 2-415

Mr. Dennis' final underlying constitutional claim centers on his contention that Okla. Stat. Tit. 63, § 2-415 is unconstitutionally vague. Specifically, Mr. Dennis claims a denial of due process and equal protection rights on what he perceives as the unconstitutional vagueness of § 2-415, which calls for enhanced penalties for trafficking certain quantities of "cocaine base" as opposed to trafficking greater quantities of "cocaine." Mr. Dennis raised this claim in his direct state appeal. In affirming Mr. Dennis' conviction on direct appeal, the Oklahoma Court of Criminal Appeals found no merit to his vagueness argument. We review the merits of Mr. Dennis' vagueness claim to determine whether the Oklahoma Court of Criminal Appeals' adjudication of this issue resulted in a decision contrary to or involved an unreasonable

application of clearly established federal law, as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1).

To understand Mr. Dennis' argument, we must first examine the portion o § 2-415 he attacks, as well as the statutory scheme under which he was sentenced. We begin by noting § 2-415, under which Mr. Dennis was convicted, applies to those individuals considered to be "trafficking in illegal drugs" Okla. Stat. Tit. 63, § 2-415(B)(3). In order to be "trafficking in illegal drugs," a dealer must distribute, manufacture, bring into the state, or possess *a certain quantity* of the controlled dangerous substance. *Id.* § 2-415(B)(1). Section 2-415 applies if the quantity of the controlled dangerous substance at issue involves twenty-eight grams or more of "cocaine or coca leaves," or five grams or more of "cocaine base." *Id.*, § 2-415(C)(2)(a) and (C)(7)(a). Section 2-101(5) defines "coca leaves" to include "cocaine and any compound, manufacture, salt, derivative, mixture or preparation of coca leaves, except derivatives of coca leaves

which do not contain cocaine or ecgonine. *Id.* § 2-101(5). Although the Oklahoma statutes do not specifically define "cocaine base," §2-415(A)(7) expressly states "trafficking" applies to "cocaine base, commonly known as 'crack' or 'rock."

The monetary fines for trafficking twenty-eight grams or more of "coca" or "coca leaves" and for trafficking five grams or more of "cocaine base" are the same – not less than $25,000 and not more than $100,000. *Id.*, § 2-415(c)(2)(a) and (c)(7)(a). In addition, the terms of imprisonment are identical- both require not less than ten years nor more than life in prison.[11] *Id,* §§ 2-415(D)(1); 2-401(B)(1); 2-206(4). In

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[11] Section 2-415 requires a term of imprisonment for trafficking any form of cocaine of "[n]ot less than twice the term of imprisonment provided for in Section 2-401." Okla. Stat., tit. 63, (c)(2)(a) 2-415(D)(1). Section 2-401 requires a term of imprisonment of not less than five years nor more than

contrast, the term of imprisonment for simple possession of distribution of any form of cocaine, in quantities not constituting "trafficking" is "not less than five (5) years or more than life" and the fine is not more than $100,000. Okla. Stat. Tit. 63, § 2-401(B)(1). Consequently, the primary difference between a conviction for "trafficking" and a conviction for simple possession or distribution (*i.e.*, "non-trafficking") of cocaine or cocaine base is that the minimum sentence for "trafficking" is ten years compared to a minimum sentence of five years for "non-trafficking." The minimum

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life for Schedule II narcotic drugs. *Id.*, (c)(2)(a) 2-401(B)(1). Under (c)(2)(a) (c)(2)(a) 2-206 and 2-101(26), cocaine leaves, cocaine and any compound thereof are considered a Schedule II narcotic drug. *Id.*, (c)(2)(a) (c)(2)(a) 2-206, 2-101(26). Because the term of imprisonment must be at least twice the five years provided in (c)(2)(a) 2-401, the term of imprisonment under (c)(2)(a) 2-415 is ten years to life.

fine for "trafficking" is $25,000, while no minimum fine exists for "non-trafficking." The maximum fine for both offenses is $100,000.

With this statutory structure in mind, we look more closely at Mr. Dennis' argument. Mr. Dennis suggests § 2-415 and other related statutes are unconstitutionally vague because they do not "provide any definitional or explanatory chemical, biological or commonly understood distinction" between trafficking in "cocaine" and "cocaine base." Specifically, Mr. Dennis contends § 2-415 is unconstitutionally vague because it does not clearly distinguish "cocaine" from "cocaine base" yet requires only five grams of "cocaine base" to constitute "trafficking," while it takes a total of twenty-eight grams of "cocaine" to constitute "trafficking." As a result, Mr. Dennis asserts the Oklahoma legislature impermissibly provides separate, distinct and unequal punishments for "trafficking" in "cocaine" as opposed to "cocaine base." Mr. Dennis points

out that if the twenty-eight-gram limit for "cocaine" had been applied in his case, he would not have received two "trafficking" convictions under § 2-415 for the ten grams distributed and 20.7 grams possessed, because neither equals twenty-eight grams as required for a "cocaine" trafficking conviction.[12] Continuing with this premise, Mr. Dennis claims the state would only have been able to charge him with "non-trafficking" offenses under § 2-401, which provides for

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[12] At oral argument, Mr. Dennis' counsel described the cocaine in this case as rock cocaine, and in his brief, Mr. Dennis does not seem to dispute the fact he distributed and possessed "cocaine base," which the Oklahoma legislature intended to also mean "rock cocaine." Instead, Mr. Dennis suggests the statute does not sufficiently differentiate "cocaine base" from "cocaine." We disagree for the reasons set forth in our discussion.

a lesser sentence, and thus "the jury might have imposed a lesser sentence."

Admittedly, "vague sentencing provisions may post constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." *United States v. Batchelder*, 442 U.S. 114, 123 (1979). However, to raise a vagueness claim, it is not sufficient for Mr. Dennis to simply complain the Oklahoma legislature should have chosen clearer and more precise language to clarify any differences between cocaine base and cocaine, and the corresponding fines and sentences. *See United States v. Powell*, 423 U.S. 87, 94 (1975). As we have previously held, "the Constitution does not require the legislature to incorporate Webster's [Dictionary] into each statute in order to insulate it from vagueness challenges." *Stewart v. United States Trustee (In re Stewart)*, 175 F.3d 796, 811 (10th Cir. 1999) (quotation marks and citation omitted). Instead, the void-for-vagueness doctrine requires only that a penal statute

"define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). As the Minnesota Court of Appeals stated, when addressing the same issue:

> In deciding whether the term "cocaine base" renders that statute unconstitutional, we are guided by the well-settled rule that a statute, if it can be made constitutionally definite by a reasonable construction, must be given that construction .... Words of a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary.

State v. Moore, 431 N.W.2d 565, 567-68 (Minn. Ct. App. 1988) (relying on *United States v. Harriss*, 347 U.S. 612, 618 (1954); *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975)). Moreover, it is well established that "[v]agueness challenges

to statutes which do not involve First Amendment rights are limited to the facts of the case at hand." *United States v. Hines*, 696 F.2d 722, 727 (10th Cir. (1982) (relying on *United State v. Mazurie*, 419 U.S. 544, 550 (1975)).

Applying these principles to the term "cocaine base," we note the Oklahoma legislature, by distinguishing "cocaine" from "cocaine base" throughout the Controlled Dangerous Substance Act, clearly intended "cocaine" and "cocaine base" to be treated as different substances. By requiring only five grams of "cocaine base" to constitute "trafficking," in comparison to twenty-eight grams of "cocaine," it is also evident the legislature intended to differentiate between the punishment for trafficking in smaller quantities of "cocaine base" as opposed to trafficking in larger quantities of "cocaine."

It is also clear the Oklahoma legislature intended "cocaine base" to include crack or rock cocaine, when it stated § 2-415 shall apply to "[c]ocaine base, commonly known as 'crack' or

'rock.'"[13] In referring to "cocaine base" as "crack" or "rock" the Oklahoma legislature recognized, as do our federal

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[13] Unlike here, the Minnesota statute at issue in *Moore* did not have the benefit of this or any provision defining "cocaine base." Thus, the Minnesota Court of Appeals addressed this issue by determining the common meaning of the word "base," stating:

> The word "base" ... has an ordinary meaning when used to describe a chemical substance. Webster's Dictionary defines "base" as "the chief active ingredient ... the predominating substance ... left as a residue on refining.... The American Heritage Dictionary defines "base" as a "fundamental ingredient" or "chief constituent."

431 N.W.2d at 568 (quotation marks, alterations and citations omitted). Based in part on this definition, the Minnesota court concluded its legislature intended, by using the word "base,"

sentencing guidelines, that "crack" is the street name for a form of cocaine base."[14] Moreover, we take judicial notice of the fact that cocaine base, including rock and crack cocaine, are generally considered very different substances than what is commonly considered "cocaine." On the federal level, we have faced this issue numerous times in cases contesting the constitutionality of federal statutes and sentencing guidelines that provide stiffer sentences for "cocaine base" offenses than for "cocaine" offenses.[15] *See, e.g. Brooks*, 161 F.3d at 1247

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for the substance of "cocaine base" to contain a chemical formula different than "cocaine." *Id.*

[14] *See* U.S.S.G § 2D1.1(c)(Drug Quantity Table, n. D) (Stating crack cocaine is "usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form").

[15] The federal sentencing guidelines equate one gram of "cocaine base" or "crack" to 100 grams of various forms of

(holding Tenth Circuit precedent forecloses argument that the distinction between cocaine powder and crack cocaine violates due process and equal protection rights); *United States v. Thurmond*, 7 F.3d 947, 950, 953 (10th Cir. 1993) (concluding "cocaine base is simply a different drug than cocaine powder, with a different chemical composition"), *cert. denied*, 510 U.S. 1199 (1994); *United States v. Turner*, 928 F.2d 956, 960 (10th Cir. 1991) (holding "different penalties for cocaine base and cocaine in its other forms do not violate due process.")

Given § 2-415 equates "cocaine base" with "rock" or "crack" cocaine, we hold the statute defines the criminal offense of trafficking in "cocaine base" with sufficient

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"cocaine." *See United States v. Brooks*, 161 F.3d 1240, 1247 (10th Cir. 1998) (relying on U.S.S.G. §2D1.1(c) (Drug Quantity Table)). Obviously, this one-to-100 gram ration is much higher ration than the Oklahoma ratio.

definiteness that it does not violate Mr. Dennis' due process of equal protection rights. Because the Oklahoma court's adjudication on this issue was not contrary to or an unreasonable application of federal law as determined by the Supreme Court, Mr. Dennis' vagueness argument must fail.

7. Ineffective Assistance of Counsel

Having reviewed Mr. Dennis' underlying constitutional claims raised in his habeas corpus petition, we conclude that although novel, each lacks merit. In so concluding, it follows Mr. Dennis' counsel's failure to raise these meritless claims at trial or on direct appeal did not prejudice Mr. Dennis' case. In other words, Mr. Dennis fails to show "'there is a reasonable probability that, but for counsel" unprofessional error, the result of the proceeding would have been different." *Hickman*, 160 F.3d at 1273 (quoting *Strickland*, 466 U.S. at 694). Our conclusion comports with the Oklahoma Court of Criminal Appeals' rejection of Mr. Dennis' ineffective

assistance of counsel claim, based on it s determination none of his underlying claims constituted a "dead bang winner" and therefore, no prejudice arose as required by *Strickland*, 466 U.S. at 687-88. (Apt. App. At 36-37.) Accordingly, we hold the Oklahoma court's adjudication on this issue meets the requirements of 28 U.S.C. § 2254(d)(1).

IV. CONCLUSION

For the foregoing reasons, Mr. Dennis fails to establish the prejudice required for his ineffective assistance of counsel claim, or to otherwise independently provide a basis for relief as sought in his habeas petition. We are satisfied the Oklahoma court's decision on Mr. Dennis' ineffective assistance of counsel claim and underlying claims was not contrary to or an unreasonable application of clearly established federal law, as determined by the Supreme Court, 28 U.S.C. § 2254(d)(1). Accordingly, the district court's

decision denying Mr. Dennis a writ of habeas corpus is **AFFIRMED**.

(2)

Supreme Court, U.S.
FILED

01-49 NOV 16 2000

OFFICE OF THE CLERK

NO. _____

In The
Supreme Court of the United States

HENRY LEE DENNIS,
Petitioner,
vs.
STATE OF OKLAHOMA,
Respondent.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

BARBARA CRAMPTON
Counsel of Record
505 Lamar Avenue
Wichita Falls, Texas 76307
Tel. No. (940) 723-9749

ROBERT ESTRADA
Of Counsel
1007 Eleventh Street
Wichita Falls, Texas 76307
Tel. No. (940) 723-9747

34 pp

OPINION BELOW

The Order of the United States District Court for the Western District of Oklahoma adopting the Report and Recommendation of the United States Magistrate Judge filed June 8, 2000 is reprinted in the Supplemental Appendix ("Supp. App.") beginning at Supp. App. 1.

The Report and Recommendation of the United States Magistrate Judge filed June 7, 2000 is reprinted beginning at Supp. Äpp. 3.

SUPPLEMENTAL APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR
THE
WESTERN DISTRICT OF OKLAHOMA

FILED
JUN 081999
ROBERT D. DENNIS CLERK
U.S. DIST. COURT, WESTERN DIST. OF OKLA.
BY s/bDeputy

HENRY LEE DENNIS, Petitioner,	)	
v.	)	No. CIV-98-335-A
DAYTON POPPEL, et al., Respondents.	)	

DOCKETED

ORDER

This matter is before the Court for review of the Report and Recommendation of United States Magistrate Judge Valerie K. Couch issued June 7, 1999 pursuant to 28 U.S.C. § 636(b)(l)(B)-(C). Judge Couch recommends denial of the petition for reasons of procedural default and lack of merit. Petitioner has timely objected, triggering the Court's duty to make a de novo determination of issues raised. *See* 28 U.S.C. § 636(b) (1); Fed. R. Civ. P. 72(b).

Petitioner stands convicted of four state law offenses and sentenced to four consecutive terms of imprisonment. He asserts eight grounds for relief, including a claim that his attorney was ineffective for failing to assert the other seven issues properly at trial and on appeal.[1] Judge Couch has examined the merits of all eight claims, including ones as to which respondent raises a defense of procedural bar, to determine that petition has not shown ineffective assistance of counsel, case for procedural default, or entitlement to relief.

Petitioner challenges both the findings of procedural default and the rejection of his other claims. Upon de novo review of issues properly raised, the Court finds Judge Couch's analysis to be correct. Further, as to some claims (particularly grounds six and seven of the petition), petitioner merely refers to prior briefs and says not more than "I object." Such an objection failes to preserve any issue for review. *See United States v. One Parcel of Real Property*, 73 F.3d. 1057, 1060 (10th Cir. 1996).

Therefore, the Court adopts the Report and Recommendation. The petition for writ of habeas corpus under 28 U.S.C. § 2254 is DENIED.

Signed by: Wayne Alley
WAYNE E. ALLEY
United States District Judge

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[1] Despite this assertion, there is no dispute that at least two issues were raised on direct appeal and decided adversely to petitioner. Also, petitioner asserts that other issues were properly raised during his direct appeal by a petition for rehearing.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED
JUN 071999
ROBERT D. DENNIS CLERK
U.S. DIST. COURT, WESTERN DIST. OF OKLA.
BY s/bDeputy

HENRY LEE DENNIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. CIV-98-335-A
	)	
DAYTON POPPEL, et. al.,	)	
	)	
Respondents	)	DOCKETED

REPORT AND RECOMMENDATION

Petitioner, a state prisoner appearing with counsel, brings this action pursuant to 28 U.S.C. §2254 seeking a writ of habeas corpus. The Respondent has filed a response to the Petition, to which Petitioner has replied, and the case is now at issue. Pursuant to an order entered by United States District Judge Wayne E. Alley, the matter has been referred to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. §636(b)(l)(B).[1] For

[1] This matter was originally referred to United States Magistrate Judge Doyle W. Argo. By Order of the District Court dated April 7, 1999, the original referral was vacated and the case was referred to this Magistrate Judge.

the reasons set forth herein, it is recommended that the Petition be denied.

By this action, Petitioner challenges his convictions after jury trial in Tillman County District Court, Case No. CF-93-28, for Trafficking in illegal Drugs by Distributing a Quantity of Cocaine Base of 5 Grams or More (Count 1), Trafficking in Illegal Drugs by Possessing or Possessing with Intent to Deliver or Distribute a Quantity of Cocaine Base of 5 Grams or More (Count 2), Distribution of Cocaine Base Without Proper Tax Stamps Affixed (Count 3), and Possession of Cocaine Base Without Proper Tax Stamps Affixed (Count 4), all counts after former felony conviction. Petitioner was sentenced to life imprisonment and a $100,000 fine on Count 1; life imprisonment and a $100,000 fine on Count 2; ten years' imprisonment on Count 3; and ten years' imprisonment Count 4, with all sentences to be served consecutively.

Facts of the Case

On May 19, 1993, members of the Oklahoma Attorney General's Drug Task Force, working with other law enforcement persons, undertook an undercover narcotics investigation with the assistance of a state informant, Charles Shaw. (TR. I, p. 221-222; TR. II, p. 7) Shaw placed a page to Petitioner who was in Vernon, Texas. (TR. II, pp. 12, 82) Petitioner returned the page by placing a phone call to Shaw who was at the police station in Altus, Oklahoma, with members of the investigation team, and Shaw requested that Petitioner meet him in Frederick, Oklahoma (TR. I, pp. 142-143, TR. II, pp. 13-14). The purpose of the meeting was for Shaw to buy crack cocaine from Petitioner. (TR. II, p. 7) Later that same evening, Shaw paged

Petitioner and a meeting was arranged at "Chiefs", a local hangout in Frederick. (TR. I, pp. 143, 146; TR. II, pp. 17-18) During this period of time, Shaw was in the company of Agent David Williams who continued on with Shaw to the arranged meeting place. (TR. I, pp. 146-147; TR. II, p. 18) When Petitioner arrived at Chiefs, Shaw came out and after a brief conversation paid Petitioner approximately $450 for the purchase of rock cocaine. (TR. I, pp. 148-149; TR. II, p. 21) Shaw then returned to the car where Agent David Williams was hiding and handed Williams a piece of rock cocaine weighing approximately 10.0 grams which he had bought from Petitioner. (TR. I, pp. 148-149; TR. II, pp. 22-23) Petitioner drove a couple of blocks from the meeting place and was subsequently stopped by a Detective Carder. (TR. II, pp. 23-24) Carder and Sheriff Hanes handcuffed Petitioner and placed him into custody. (TR. II, pp. 24-25) The car that Petitioner was driving was then searched, and in the floorboard of the car another quantity of rock cocaine weighing approximately 20.7 grams was found. (TR II, pp. 25-26)

Petitioner's Claims

Petitioner raises eight grounds for habeas relief: (1) double jeopardy based on his conviction for two offenses of drug trafficking pursuant to Okla. Stat. tit. 63, §2-4 15 (one offense based on distribution of a controlled dangerous substance and one offense based on possession of a controlled dangerous substance); (2) double jeopardy based on his conviction for two offenses of failure to purchase and affix tax stamps pursuant to Okla. Stat. tit. 68, §450.3 (one offense based on distribution of a controlled dangerous substance without tax stamps and the other offense based on possession of a controlled dangerous

substance without tax stamps); (3) double jeopardy based on his convictions for the separate offenses of drug trafficking and failure to purchase and affix drug tax stamps; (4) violation of due process and equal protection rights due to the alleged vagueness of Okla. Stat. tit. 63, §2-4 *15; (5)* violation of Okla. Stat, tit. 21, § 11, a statutory prohibition against double jeopardy; (6) denial of due process and equal protection rights for alleged failure to apply Okla. Stat. tit. 21, § 11; (7) illegal multiple punishments for offenses that should have merged; and (8) ineffective assistance of trial and appellate counsel.

Of these claims, Petitioner raised only grounds 3 and 4 in his direct appeal. The Oklahoma Court of Criminal Appeals (OCCA), in a summary opinion, rejected these grounds and affirmed the conviction on all counts. The remaining grounds were raised for the first time in Petitioner's application for post-conviction relief. The state district court denied post-conviction relief finding all grounds to be without merit. On appeal, the OCCA barred review of grounds 1 and 4 based on res judicata principles.[2] With respect to Petitioner's grounds 2, 3, 5, 6 and 7, the OCCA determined that Petitioner "failed to set forth and establish sufficient reason why the issues were not raised, or were inadequately raised, in his direct appeal." See OCCA Order Affirming Denial of Post-Conviction Relief at 4. Thus, it appears the OCCA deemed these claims to be

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[2] A review of Petitioner's Brief in Chief filed on direct appeal establishes that ground 1 was not raised in the direct appeal and therefore, the OCCA's determination that review of that claim was barred by res judicata was in error. Respondent duly notes the error. See Response to Petition for Writ of Habeas Corpus at 19. Ground 3, not ground 1 was raised by Petitioner in his direct appeal.

procedurally defaulted. The OCCA rejected Petitioner's ineffective assistance of counsel claim (ground eight) on the merits. The ineffective assistance of counsel claim was based on counsel's failure to raise at trial and on direct appeal the seven other claims raised by Petitioner in the instant Petition.

Analysis

Procedural Default

As to Petitioner's grounds 2, 5, 6 and 7, Respondent has raised the defense of procedural default.[3] On habeas review, a federal court does not address issues that have been defaulted in state court on an independent and adequate state procedural ground unless the petitioner can demonstrate cause for the default and actual prejudice as a

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[3] In his traverse/reply, Petitioner claims that grounds 2,5,6 and 7 were raised in his Petition for Rehearing submitted to the OCCA upon affirmance of Petitioner's conviction in his direct appeal. Therefore, Petitioner argues that these grounds are not procedurally defaulted. The record does not support Petitioner's argument. Review of the Petition for Rehearing establishes that only two issues relating to multiple punishments were raised " whether the conviction for trafficking in cocaine was subsumed by the conviction for failure to affix tax stamps and, as part of that argument, whether it was "impermissible to charge the no tax stamp as two (2) offenses." See Petition for Rehearing at 2. Furthermore, under Oklahoma law, a party cannot raise for the first time in a petition for rehearing an issue not raised on direct appeal. See Duvall v. State, 825 P.2d 621, 637 (Okla.Cr.App. 1991) (noting that the rules of the OCCA do not allow raising a new proposition of error through a petition for rehearing). As set forth herein, however, because Petitioner has raised an ineffective assistance of counsel claim as to these claims, the Court will review their merits.

result of the alleged violation of federal law or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. Coleman v. Thompson, 501 U.S. 722, 749-50 (1991); Steele v. Young, 11 F.3d 1518, 1521 (10th Cir. 1993).[4] A state procedural ground is "independent" if it relies on state law, rather than federal law, as the basis for the decision. Ake v. Oklahoma, 470 U.S. 68, 74-75 (1985); Klein v. Neil, 45 F.3d 1395, 1398-99 (10th Cir. 1995). The state procedural ground is "adequate" if it is applied evenhandedly in the vast majority of cases. Maes v. Thomas, 46 F.3d 979,985-86(10th Cir.), cert. denied. 514 U.S. 1115 (1995).

Under Oklahoma law, "post-conviction relief is reserved only for the rare set of circumstances where a particular claim 'could not have been raised on direct appeal."' Brecheen v. Reynolds, 41 F.3d 1343, 1349 n. 4(10th Cir. 1994), cert. denied. 515 U.S. 1135 (1995). This rule is generally an independent and adequate state ground for refusing to review claims not raised on direct appeal. Id. at 1356; Odum v. Boone. 62 F.3d 327, 331 (10th Cir. 1995). However, a claim of ineffective assistance of counsel may constitute "cause" for a procedural default requiring a court to consider the claim on federal habeas review. See Coleman v. Thompson, 501 U.S. 722, 753-54 (1991).

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[4] A fundamental miscarriage of justice requires a showing of factual innocence. See Steele 11 F.3d at 1522; United States v. Richards, 5 F.3d 1369, 1371 (10th Cir. 1993). Petitioner has not alleged factual innocence. Therefore, the Court limits its review of the procedural default defense to an analysis of cause and prejudice.

Ineffective Assistance of Counsel -- (Ground Eight)

In ground eight of his Petition, Petitioner claims that he was denied effective assistance of counsel at trial and on appeal to his prejudice "which denied him his constitutional right to a first appeal as of right-- requiring reversal." See Brief of Petitioner at 19. Petitioner submits this claim as to all other seven grounds for relief raised in his Petition, including those which Respondent claims are procedurally defaulted.[5]

Petitioner's federal habeas Petition was filed on March 5, 1998. Therefore, review of his ineffective assistance of counsel claim is governed by 28 U.S.C. §2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996. See Lindh v. Murphy, 521 U.S. 320 (1997); Fleming v. Hargett, No. 98-6059, 1998 WL 427140 (10th Cit., July 14, 1998)[6] Petitioner is not entitled to habeas

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[5] Petitioner did not raise the claim of ineffective assistance of counsel on direct appeal. However, because the same counsel represented Petitioner at both the trial and appellate level, this claim is not procedurally defaulted. See English v. Cody, 146 F.3d 1257, 1264 (10th Cir. 1998) (Oklahoma procedural bar will preclude federal habeas review of ineffective assistance of counsel claim only in limited cases where trial and appellate counsel differ and the ineffectiveness claim can be resolved upon the trial record alone). Moreover, because the OCCA denied Petitioner's claim of ineffective assistance of counsel on its merits, the claim is not procedurally defaulted and must be reviewed. See Ylst v. Nunnemaker, 501 U.S. 797, 800 (1991) ("[I] f the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal court review that might otherwise have been available."); Harris v. Reed, 489 U.S. 255, 262 (1989) (claims not treated as waived by state courts must be considered on the merits). Respondent does not assert a procedural default with respect to Petitioner's ineffective assistance of counsel claim.

relief unless the state court's adjudication of this claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(l).

To establish "cause" sufficient to overcome a procedural default based on ineffective assistance of counsel, Petitioner must satisfy both prongs of the test established in Strickland v. Washington, 466 U.S. 668 (1984); that is, he must show (1) that his attorney's representation fell below an objective standard of reasonably competent assistance; and (2) that there is a reasonable probability that the result of the trial or appeal would have been different but for the attorney's deficient performance, i.e. Petitioner must show prejudice as a result of the deficient performance. Strickland. 466 U.S. at 688, 694.

In denying Petitioner's ineffective assistance of counsel claim on the merits, the state district court determined that because "all of the issues raised by [Petitioner] as evidence of the ineffectiveness of counsel have been found to be without merit . . . [t]here is no showing that [Petitioner] was denied effective assistance of counsel." See District Court Order at Paragraph 8. The OCCA affirmed the district court's finding that Petitioner had not established his counsel's ineffectiveness and applied the standards set forth by the Supreme Court in Strickland. The OCCA concluded that: "Petitioner has not established that any issue raised in this post-conviction proceeding was or is a 'dead bang

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[6] This unpublished decision is cited for its persuasive value in accordance with 10th Cir. R.36.3 (B).

winner,' warranting this Court's further consideration that his trial/appellate counsel was so ineffective that the proceedings against him were rendered fundamentally unfair." See OCCA Order Affirming Denial of Post-Conviction Relief at 6.

The Court will examine the merits of all grounds raised by Petitioner, including grounds 2, 5, 6 and 7 which Respondent asserts are procedurally barred, to determine whether Petitioner has been prejudiced by his trial/appellate counsel's alleged deficient performance. Because, as set forth in the analysis below, the Court finds all seven grounds to be without merit, Petitioner cannot establish prejudice and his claim of ineffective assistance of counsel necessarily fails.[7]

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[7]The failure of Petitioner to establish prejudice makes it unnecessary to determine whether counsel's performance was deficient. See Brewer v. Reynolds, 51 F.3d 1519, 1523, n. 7 (10th Cir. 1995) (noting that because court would dispose of ineffective assistance of counsel claim due to lack of prejudice, court did not need to analyze whether counsel's performance was deficient), cert. denied, 516 U.S. 1123 (1996). Moreover, the Court need not separately address the merits of Petitioner's claim of ineffective assistance of counsel. See United States v. Easter, No. 97-6137, 1998 WL 33894 (10th Cir. Jan. 29, 1998) (where stand-alone claims are raised as part of ineffective assistance of counsel claim and stand-alone claims fail on the merits precluding a finding of prejudice, court need not separately address claim of ineffective assistance of counsel) citing Strickland v. Washington, 466 U.S. 668, 697 (1984); Ross v. Ward 165 F.3d 793, 798 (10th Cir. 1999) (court need not analyze ineffective assistance of counsel claim for purposes of determining cause for a procedural default where petitioner was unable to show prejudice).

Double Jeopardy – Trafficking Convictions (Ground One)

In his first proposition, Petitioner challenges his two convictions of "trafficking" under Okla. Stat. tit. 63, §2-415 as violative of the Fifth Amendment Double Jeopardy Clause.[8] Respondent, citing Blockburger v. United States, 284 U.S. 299 (1932), contends that there is no violation of double jeopardy because the two trafficking counts are based on two separate criminal transactions: first, the sale of rock cocaine to an informant [TR. II, pp. 2 1-23]; and second, the possession of another quantum of rock cocaine found upon the subsequent arrest of Petitioner [TR. II, pp. 24-25]. Petitioner recognizes that trafficking under §2-415 can be committed by four different methods, but maintains that only one conviction can result. Petitioner therefore claims that he was found to have used two methods, simultaneously, to commit only one statutory offense.

The Double Jeopardy Clause consists of three separate constitutional protections. "It protects against a second prosecution for the same offense after acquittal. It protects

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[8] Petitioner did not raise this claim on direct appeal, but raised the issue for the first time when seeking post-conviction relief The OCCA, in affirming the denial of post-conviction relief, held this claim was barred by res judicata finding that this issue had essentially been raised in proposition one of Petitioner's direct appeal. See OCCA Order Affirming Denial of Post-Conviction Relief at 4. As Respondent correctly notes, however, a review of the record shows that the claim raised in Petitioner's direct appeal was the claim raised in ground three of Petitioner's instant Petition. Respondent does not contend that ground three is procedurally barred but instead argues the claim, though exhausted, is merit less.

against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969), overruled on other grounds, Alabama v. Smith, 490 U.S. 794 (1989). At issue here is the third protection. This third protection is limited to ensuring that "the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." Brown v. Ohio, 432 U.S. 161, 165 (1977) (citations omitted). Upon review of habeas claims based on multiple punishment, this Court determines only whether the sentencing court has imposed greater punishment than the legislature intended. Missouri. Hunter, 459 U.S. 359, 365 (1983). If the legislature intended to punish the conduct as two separate offenses, then conviction for both offenses is not prohibited provided the conduct is prosecuted in the same proceeding. See, Department of Revenue of Montana v. Kurth Ranch 511 U.S. 767, 778 (1994). The essential question raised by Petitioner's double jeopardy claim, therefore, is one of statutory construction, i.e., whether the Oklahoma legislature intended that each violation of Okla. Stat. cit. 63, §2-415(B) be a separate offense. See Ohio v. Johnson, 467 U.S. 493, 499 (1984); Missouri v. Hunter, 459 U.S. at 366.

In determining whether a state legislature intended to prescribe cumulative punishments for a single criminal incident, this Court is "bound by a state court's determination of the legislature's intent." Cummings v. Evans, 161 F.3d 610, 615 (10th Cir. 1998), cert. denied, ____ U.S. ____, 119 S.Ct. 1360 (1999), quoting Birr v. Shillinger, 894 F.2d 1160, 1161 (10th Cir.), cert. denied 496 U.S. 940 (1990). Whether the Oklahoma legislature intended for multiple punishments to be imposed pursuant

to Okla. Stat. cit. 63, §2-415(B)(1)[9] is an issue not previously addressed by the Oklahoma courts. The Oklahoma courts have, however, addressed the issue of multiple punishments in construing Okla. Stat. tit. 63, §2-401(A)(1), and a statute, as pointed out by Petitioner that is similar to the statute at issue.[10]

Petitioner relies on Watkins v. State. 855 P.2d 141 (Okla. Cr. App. 1992), a case finding a double jeopardy violation in relation to Okla. Stat. tit. 63, §2-401(A)(l). The state district court, in denying post-conviction relief, ruled that Watkins did not apply to the facts of Petitioner's case. See District Court Order at 1.

In Watkins, the appellant had been arrested "for causing a single package containing two types of controlled substances to be shipped from Oklahoma to California." The OCCA applied the "same evidence test" and found

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[9] Section 2-415(B)(1) provides:

> **1. Knowingly distribute, manufacture, bring into this state or possess a** controlled substance specified in subsection A of this section in the quantities specified in subsection C of this section.
>
> Okla. Stat tit. 63, §2-415(B)(1).

[10] Section 2-401(A)(1) provides:

> Except as authorized by the Uniform Controlled Dangerous Substances Act, Section 2-101 et seq. of this title, it shall be unlawful for any person:
>
> 1. To distribute [or] dispense . . . a controlled dangerous substance or possess with intent to manufacture, distribute, or dispense, a controlled dangerous substance.
>
> Okla. Stat. tit. 63, §2-401(A)(1) (Supp. 1993).

double jeopardy violated because the appellant had been charged with multiple counts of possession and conspiracy for each of the types of drugs found in the single package and the elements of each count were the same. The charges arose under Okla. Stat. tit. 63, §2-401 for possession with intent to distribute "a controlled dangerous substance". The OCCA found liability could exist for only one count of possession and one count of conspiracy because the statutory prohibition in §2-401 did not distinguish between types or classifications of drugs.[11]

In Petitioner's case, however, the issue is whether two separate acts identified in a single statutory provision (distribution and possession) can give rise to multiple offenses, making this case more factually analogous to Ferguson v. State, 644 P.2d 121) Okla. Cr. App. 1982). In Ferguson another case involving a violation of §2-401, the appellant claimed a violation of double jeopardy where he previously had been convicted of possession of marijuana with intent to distribute and thereafter, in a separate proceeding, was convicted of unlawful delivery of marijuana. The OCCA, applying the Blockburger same evidence test, rejected appellant's double jeopardy claim based on the finding that "different caches of marijuana" supported each of the convictions. Id. at 122. Appellant's possession charge was based on marijuana in his possession after having made a sale, while the unlawful delivery

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[11] In contrast to §2-401 at issue in Watkins the prohibition of §2-415 does distinguish between types or classification of drugs. Subsection A of §2-415 identifies seven particular substances to which the Act applies, and Subsection C of §2-415 establishes distinct punishments for violations involving specified quantities of each substance. See also footnote 9, supra.

charge was based on marijuana appellant had previously sold to an informant. Id. See also Warthen v. State 559 P.2d 483,484-85 (Okla. Cr. App. 1977) (finding no violation of double jeopardy for convictions of unlawful delivery and possession with intent to distribute under §2-401 where offenses arose on same night but charge of intent to distribute was not based upon marijuana bought and removed by agent but instead on marijuana subsequently found in the possession of the defendant); Howell v. Scott, No. 96-6 183, 1996 WL 705203 (10th Cir., Dec. 9, 1996) (rejecting as "ludicrous" petitioner's claim that "multiple punishments for charges of possession of LSD, marijuana and cocaine constitute double jeopardy under Oklahoma and federal law because they all arose from a single incident involving the 'single criminal act' of possessing drugs").[12]

The evidence of record establishes that Petitioner distributed one quantum of rock cocaine to an informant and possessed a distinct quantum of rock cocaine which he retained and which was seized after the completion of the sale to the informant upon Petitioner's subsequent arrest. Under Oklahoma law, the completed distribution of a quantity of drugs is a criminal act that is separate and distinct from the possession of additional drugs intended for future sale. The trafficking crimes for which Petitioner was convicted, therefore, were separate and distinct and not, as asserted by Petitioner, simultaneous methods for committing a single statutory offense. Petitioner's Fifth Amendment double jeopardy claim relating to his two convictions of drug trafficking for offenses committed in

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[12] This unpublished decision is cited for its persuasive value in accordance with 10th Cir. R.36.3(B).

violation of Okla. Stat. tit. 63, §2-415 is rejected. The separate clauses of §2-415 allow for conviction of two different offenses, possession with intent to distribute and distribution where, as here, the evidence indicates separate quantities of drugs underlie the two offenses charged.[13]

Double Jeopardy -- Tax Stamps Convictions (Ground Two)

In ground two, Petitioner challenges, as a violation of double jeopardy, his convictions for two offenses of "distribution and possession of controlled dangerous substance without purchasing and affixing tax stamp" (Petitioner's Brief at *5)* in violation of the Controlled Dangerous Substance Tax Act, Okla. Stat. tit. 68, § *§450.1* - 450.9 (the "Tax Act"). This issue was not raised on direct appeal but instead was raised for the first time in Petitioner's application for post-conviction relief. The state district court, in rejecting this argument, found that "there

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[13] The Court finds further support for this result in case authority construing a federal drug statute, 21 U.S.C. §841(a), which contains provisions analogous to §2-415. Claims of double jeopardy based on a conviction of two or more offenses under §841(a) have consistently been rejected where, as here, separate and distinct quantities of drugs underlie the two offenses charged. See, United States v. Johnson, 977 F.2d 1360, 1374 (10th Cir. 1992) (various stashes of a drug give rise to separate offenses where the evidence indicates they were intended for different purposes or transactions and under such circumstances, a conviction under §841(a) of both possession and possession with intent to distribute does not violate double jeopardy), Behrens v. United States, 506 U.S. 1070 (1993); United States v. Randall, 1999 WL 183781 (4th Cir. April 5, 1999) (separate clauses within §841(a) for possession with intent to distribute and distribution are two different offenses and conviction for both offenses does not violate double jeopardy).

were two separate and distinct instances of 'distribution and/or possession of controlled dangerous substance without purchasing and affixing tax stamps"' and therefore Petitioner was not subjected to double jeopardy. See District Court Order at 1.

In the present Petition, Petitioner claims that he possessed "the entire 30.7 grains" of cocaine base, which resulted in his conviction without the requisite tax stamps and therefore could be found guilty of only one offense under the Tax Act. Petitioner's two convictions under the Tax Act, however, were based on evidence that Petitioner had distributed approximately 10.0 grains of cocaine base without the proper tax stamp affixed and possessed approximately 20.7 grains of cocaine base without the proper tax stamp affixed.

A plain reading of Section 450.8(B) of the Tax Act demonstrates that a violation occurs whenever a dealer distributes a controlled dangerous substance without affixing the appropriate stamp and whenever a dealer possesses a controlled dangerous without affixing the appropriate stamp:

> Any dealer manufacturing, distributing, producing, shipping, transporting, importing or possessing any controlled dangerous substance without affixing the appropriate stamp, upon conviction, is guilty of a felony.

Okla. Stat. tit. 68, §450.8(B) (emphasis added). The statutory language creates a separate offense for failure to affix the requisite tax stamp with regard to each act identified therein. The legislative intent is clear that

punishment for both offenses is authorized. See Hunter, supra, 459 U.S. at 365. The Court finds, therefore, that no double jeopardy violation attaches to Petitioner's conviction for separate offenses of distribution of cocaine base without proper tax stamps affixed and possession of cocaine base without proper tax stamps affixed.

Double Jeopardy -- Trafficking Convictions Subsumed by Tax Stamp Conviction (Ground Three)

In ground three, Petitioner claims a violation of double jeopardy contending that his trafficking convictions pursuant to Okla. Stat. tit. 63, §2-415 were "totally subsumed" by his tax stamp convictions pursuant to Okla. Stat. tit. 68, §450.1. Both Petitioner and Respondent cite to Blockburger v. United States 284 U.S. 299 (1932), in support of their respective positions on this issue focusing on whether the tax stamp convictions required proof of an element not required for the trafficking convictions. The Court finds, however, that Missouri v. Hunter, 459 U.S. 359 (1983), controls the issue.

In Hunter, the Court explained the Blockburger test to be a rule of statutory construction intended to prevent double punishment in a situation where the legislature has in fact intended to provide a single punishment for the offense:

> [S]imply because two criminal statutes may be construed to proscribe the same conduct under the Blockburger test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes. .

> Where, as here, a legislature specifically authorizes cumulative punishments under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under Blockburger, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.

Hunter, 459 U.S. at 368-69.

Again, the question before this Court is one of legislative intent: whether the Oklahoma legislature intended that a person be convicted for both trafficking under Okla. Stat. tit. 63, §2-415 and failing to affix tax stamps under the Tax Act. This Court defers to the OCCA's interpretation of state law in assessing whether the legislature intended cumulative punishments. Cummings, supra, 161 F.3d at 614; Mansfield v. Champion, 992 F.2d 1098, 1100 (10th Cit. 1993).

The OCCA rejected this very argument made by Petitioner in White v. State, 900 P.2d 982 (Okla. Crim. App. 1995). In that case, White, like Petitioner, was convicted of both trafficking in violation of Okla. Stat, tit. 63, §2-4 15 and unlawful possession of a controlled dangerous substance without a tax stamp in violation of Okla. Stat. tit. 68, §450.1. White did not raise a double jeopardy claim until his petition for rehearing, relying upon Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767 (1994), which had been decided during the pendency of his appeal. In that case, the Supreme Court

found that a Montana drug tax violated double jeopardy because it allowed the commencement of tax collection proceedings the taxpayer had already been convicted of the drug offense. The Supreme Court expressly noted, however, that imposing the drug tax in the same proceeding as the prosecution for the drug offense would be permissible. Id. at 783.

In denying White's petition for rehearing, the OCCA found that "where a defendant is punished for both failure to pay a drug tax and committing a drug offense, all in the same proceeding, no double jeopardy problem exists." Id. at 996. The OCCA, therefore, has rejected a double jeopardy challenge to convictions of trafficking and failure to affix a tax stamp, a conclusion that is consistent with Kurth Ranch.

Moreover, the statutory language of the Tax Act makes clear that the Oklahoma legislature intended punishment hereunder to be in addition to other statutory offenses. Section 450.1(2) of the Tax Act defines "dealer" as a person who "in violation of the Uniform Controlled Dangerous Substances Act[14] manufactures, distributes, produces, ships, transports, or imports into Oklahoma or in any manner acquires or possesses ... seven or more grams of any controlled dangerous substance..." (Emphasis added.) This statutory language makes clear that when the legislature created additional penalties for the crime of failure to affix a drug tax stamp, the legislature recognized that the drug tax stamp requirement would apply against one who was also in violation of a separate criminal law. See State v. Detweiler, 544 N.W.2d 83, 91 (Neb. 1996)

[14] See Okla. Stat. tit. 63, §§2-101 et seq.

(examining similar Nebraska drug tax stamp and holding that legislature intended to punish both for failure to affix a drug tax stamp and possession with intent to deliver and finding no double jeopardy violation).

Further confirmation that punishment for violation of the Tax Act was intended to be in addition to other punishments is found in §450.8 (C) which provides: "Nothing in this Act may in any manner provide immunity for a dealer from criminal prosecution pursuant to Oklahoma law." See Okla. Stat. tit. 68, §450.8(C). This section recognizes that compliance with the tax stamp requirements does not insulate a dealer who possesses or distributes a taxable substance like cocaine base from prosecution or conviction under Oklahoma law. See State v. Gallup, 500 N.W.2d 437,443 (Iowa 1993) (affirming conviction of delivery of controlled substance and distribution of taxable substance without drug tax stamp where legislative intent established cumulative punishment under two statutes was authorized regardless of whether those statutes proscribed the same conduct under application of a Blockburger test).[15]

Based on both the OCCA's pronouncements in White and the legislative intent as ascertained from the statutory language of the Tax Act, punishment for both trafficking and failure to affix a tax stamp is authorized under Oklahoma law. Because the Oklahoma legislature has demonstrated intent to permit cumulative punishments, the double jeopardy clause is not violated. See, Ohio v.

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[15] "The Iowa statutory provisions at issue in Gallup are virtually identical to the provisions in the Oklahoma Tax Act.

Johnson, 467 U.S. at 499. Accordingly, Petitioner is not entitled to relief on this claim.

Vagueness of Okla. Stat. tit. 63, §2-415 -- (Ground Four)

Ground Four of the Petition challenges the conviction for the trafficking offenses pursuant to Okla. Stat. tit. 63, §2-415 on the ground that the statutory provisions are unconstitutionally vague and thereby violate Petitioner's due process and equal protection rights. Petitioner raised this issue both in his direct appeal and in seeking post-conviction relief. The OCCA, in affirming the conviction on direct appeal found this issue to be without merit and on appeal from denial of post-conviction relief found the issue to be barred by res judicata.

A criminal statute will not be found void for vagueness unless it fails to define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Kolender v. Lawson, 461 U.S. 352, 357 (1983). Petitioner takes issue with the "separate, distinct, and unequal punishments for Trafficking in 'Cocaine' as opposed to 'Cocaine Base"' (Petitioner's Brief at 9) claiming that the statute fails to provide "any definitional or explanatory chemical, biological or commonly understood distinction between them." Id. Petitioner does not contend that what he possessed was not in fact rock cocaine, nor does he present any evidence to support such a conclusion. Rather, Petitioner claims he has been denied due process and equal protection because the sentence he received might have

been less if he had been charged with trafficking in cocaine rather than cocaine base.[16]

Petitioner's argument has been rejected by the Tenth Circuit in construing a federal statute similar to §2-415,[17] which provides for "unequal punishments" for offenses involving cocaine and cocaine base. See United States v. Easter, 981 F.2d 1549, 1557-58 (10th Cir. 1992) (21 U.S.C. §841(b) is not constitutionally void for vagueness because statute makes clear that "trafficking in cocaine, no matter what the form, will result in punishment" and "[t]herefore, an ordinary person is on notice that trafficking in a form of cocaine, such as cocaine base, is prohibited conduct"), cert. denied 508 U.S. 953 (1993); United States v. Turner, 928 F.2d 956, 959 (10th Cir. 1991) ("different penalties [under 21 U.S.C. §841(b)] for cocaine base and cocaine in its other forms do not violate due process"), cert. denied, 502 U.S. 881 (1991).[18] Because Petitioner does not dispute that the

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[16] Trafficking in cocaine requires a minimum of 28 grams of the controlled dangerous substance while trafficking in cocaine base requires a minimum of 7 grams of the controlled dangerous substance. See Okla. Stat. tit. 63, §2-415(C)(2)(a) and (7)(a). Petitioner's two trafficking convictions were based on possession of 10.0 and 20.7 grams of cocaine base, respectively.

[17] See 21 U.S.C. § 841(b)(1).

[18] Petitioner cites United States v. Davis, 864 F. Supp 1303 (N.D. Ga. 1994) in support of his vagueness challenge to §2-415. As Easter and Turner establish, however, the Tenth Circuit has rejected challenges to the one accepted by the court in Davis. Several other courts have also rejected the district court's analysis in Davis See United States v. Lightner, Nos. 94-5540, 94-554 1, 1996 WL 295284 (4th Cir. June 5, 1996), cert. Denied, 519 U.S. 940 (1996); United States v. Jackson, 84F.3d 1154 (9th Cir. 1996), cert. Denied 519 U.S. 986(1996); United Statesv. Rentena No. 94-5847, 1996 WL 279006 (4th Cir. May 28, 1996); United States v. Crawford, 83 F.3d 964 (8th Cir.

substance he possessed was a form of cocaine, §2-415 is not unconstitutionally vague as applied to the facts of this case as Petitioner was sufficiently on notice that he was engaged in prohibited conduct. Ground four, therefore, is without merit.

Double Jeopardy -- Okla. Stat. tit. 21. §11 (Ground Five)

Petitioner, in ground five, cites Okla. Stat. tit. 21, § 11, a statutory double jeopardy provision, as grounds for dismissing three of his convictions. This issue was first raised in Petitioner's application for post-conviction relief. The state district court rejected the claim, finding that Petitioner "was convicted of two separate counts of trafficking and of two separate counts of failure to affix tax stamps...separate and distinct offenses, consisting of different elements of dissimilar proof." See District Court Order at 2.

Section 11 provides:

> an act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, ... but in no case can [it] be punished under more than one; and an

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1996), cert. Denied 519 U.S. 903 (1996); United States v. Smith, 73 F.3d 1414 (6th Cir. 1996); United Statesv. Booker, 70 F.3d 488, 489-91 (7th Cir. 1995), cert. Denied 517 U.S. 1111 (1996); United States v. Hatchett, 68 F.3d 477 (7th Cir. 1995), . denied, 516 U.S. 1151 (1996); United States v. Fisher, 58 F.3d 96, 99 (4th Cir.), cert. Denied, 516 U.S. 927 (1995); United States v. Buchanon 909 F.Supp. 99, 101 (N.D.N.Y. 1995).

> acquittal or conviction and sentence under either one, bars the prosecution for the same act or omission under any other.

Okla. Stat. tit. 21, § 11(1991). This statutory provision, which is separate from the double jeopardy provisions of the Oklahoma state constitution, has been found to be indicative of the Oklahoma legislature's intent that a defendant be punished only once for a single act even though that act or omission is punishable under different statutes. See Hale v. State, 888 P.2d 1027, 1030 (Okla. Crim. App. 1995). Application of§11 is a question of state law not subject to review on federal habeas. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). This Court considers the provision, therefore, only for purposes of ascertaining legislative intent in relation to determining whether a federal double jeopardy violation has occurred. See Cummings v. Evans, 161 F.3d 610, 614 (10th Cir. 1998).

The OCCA, interpreting Section 11, has declared that if a single criminal act gives rise to offenses which are not separate and distinct, but rather are (1) mere means to some other ultimate objective, (2) lesser included offenses; or (3) merely different incidents or facets of some other offense, that conduct may not be punished under more than one statute. Hale, 888 P.2d at 1029. Under §11, the proper analysis is:

> neither whether the offenses arise from the same conduct nor whether they must be proved by the same evidence, but whether, taken as a whole, a defendant has been punished twice for one criminal course of

> conduct where his offenses were incident to one objective.

Id. (emphasis added).

The OCCA has held that the completion of one separate and distinct offense does not prevent the defendant from being punished for a later offense committed within the same criminal episode if the two offenses did not assist each other, i.e., neither is a means to the other. Section 11 does not apply under those circumstances because the defendant has manifested two separate criminal objectives. Cummings, 161 F.3d at 615 citing Ashinsky v. State, 780 P.2d 201, 208 (Okla. Crim. App. 1989).

The Oklahoma courts have yet to apply § 11 to offenses under Okla. Stat. tit. 63, §2-415. In Mathues v. State, 925 P.2d 64 (Okla. Cr. App. 1996), however, the OCCA relied on § 11 in finding a double jeopardy violation for multiple convictions arising out of offenses under Olda. Stat. tit. 63, §2-40 1, which, as previously noted, is a statutory provision similar to §2-415. The appellant in that case was charged with two separate crimes, delivery of cocaine and receiving or acquiring proceeds derived from that delivery. The separate crimes for which appellant was convicted arose out of the singular act of selling a single rock of cocaine. Id. at 65. The OCCA found appellant had been punished twice for one criminal act because "both charged offenses were incident to one objective." Id. This is not a case like Mathues, however, where the two convictions for possession and distribution were based on a single act of selling singular quantum of rock cocaine. Rather, here, the record clearly establishes two criminal acts that were not incident to one objective. Upon completion of the sale of

rock cocaine to Shaw, Petitioner retained in his possession an additional quantum of rock cocaine. Petitioner has not, therefore, been subjected to double jeopardy prohibited under the provisions of § 11.

In ground six of his Petition, Petitioner raises a due process/equal protection claim based on an alleged failure of the state courts to apply Okla. Stat, tit. 21, § 11. Petitioner asserts that failure to apply § 11 resulted in a conviction for multiple offenses that should have been deemed a singular offense and therefore his punishment has been increased. According to Petitioner, the state courts' failure to apply § 11 results in a judicial ex post facto decision in violation of his constitutional rights to due process and equal protection.

Petitioner did not raise this issue until seeking post-conviction relief. In denying that relief, the district court rejected this claim citing Ashinsky v. State, 780 P.2d 201 (Okla. Cr. App. 1989). In Ashinsky, the OCCA cited to Okia. Stat. tit. 21, § 11 in determining a double jeopardy issue. Thus, it appears that § 11 was properly considered and determined by the state district court to be inapplicable. Because § 11 is purely a matter of state law, this Court is bound by the determination of the district court with respect to this issue. Ohio v. Johnson, 467 U.S. 493, 499 (1984) (when reviewing a state legislature's intention regarding cumulative punishments for a single incident, this Court is bound by the state court's determination of the legislature's intent); Lucero v. Kerby, 133 F.3d 1299, 1316 (10th Cir.), cert. denied, 118 S.Ct. 1684 (1998) (in habeas review, federal court defers to state court's interpretation of statutory provisions to determine separate offenses for double jeopardy purposes). Petitioner has failed to show

that his constitutional rights have been violated as a result of § 11. Moreover, the Court has determined herein that under both the Fifth Amendment and the legislative intent as expressed in § 11, Petitioner has not been subjected to double jeopardy. No judicial ex post facto decision has occurred and no increased punishment has been imposed on Petitioner. Accordingly, ground six is without merit.

Merger of Offenses (Ground Seven)

In ground seven, Petitioner alleges that under the doctrine of merger of offenses his convictions violate constitutional double jeopardy. The Court has found each of Petitioner's double jeopardy claims to be without merit and therefore rejects Petitioner's contention that his offenses should merge. Unlike Williams v. State, 807 P.2d 271 (Okla. Grim. App. 1991), relied upon by Petitioner, which involved merger of a felony charge with a murder charge in a felony-murder conviction, here each of the charges against Petitioner involve a separate and distinct offense. See Doyle v. State, 785 P.2d 317, 325-26 (Okla. Crim. App. 1989) (rejecting appellant's contention that sentences should run concurrently since offenses were committed during single episode and finding no abuse of discretion in running sentences consecutively where each offense committed consisted of "separate and distinct elements, none of which merged into proof of any of the others").

Petitioner further submits that at a minimum, pursuant to Okla. Stat. tit. 22, § 976, his sentences should have run concurrently, rather than consecutively. Therefore, the only issue raised by ground seven is whether the provisions of

Okla. Stat. tit. 22, §976 have been properly applied.[19] This is purely an issue of state law, not cognizable on federal habeas review. See Walker v. Champion, No. 97-6402, 1998 WL 712588 at *1 (10th Cir. Oct. 13, 1998) (on habeas review, court "affords wide discretion to state trial court's sentencing decision, and challenges to that decision are not generally constitutionally cognizable, unless it is shown the sentence imposed is outside the statutory limits or unauthorized by law"); Ellifrits v. Davies No. 91-3252, 1992 WL 43494 (10th Cir, March 2, 1992) (habeas petitioner's challenge to consecutive sentences as abuse of state trial court's discretion presented claim of state law not cognizable on federal habeas review).[20] Petitioner's sentences appear to be in conformity with state law. The record establishes that Petitioner had been convicted of a prior felony of possession with intent to distribute a controlled dangerous substance, marijuana. (TR II, p. 89) Therefore, his sentences for the two trafficking charges at issue here were governed by Okla. Stat. tit. 63, §2-415(D)(2). The sentences he received are within the statutory range of permissible punishment. Likewise, the

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[19] Section 976 provides:

> If the defendant has been convicted of two or more offenses, before judgment on either, the judgment may be that the imprisonment upon any one may commence at the expiration of the imprisonment upon any other of the offenses. Provided, that the sentencing judge shall, at all times, have the discretion to enter a sentence concurrent with any other sentence.

Okla. Stat. tit. 22, §976 (1991).

[20] These unpublished decisions are cited for their persuasive value in accordance with 10th Cir. R. 36.3(B).

sentences Petitioner received for the two violations of the Tax Act governed by Okla. Stat. tit. 68, §450.8 and Okla. Stat. tit. 21, §51 are within the statutory range. [21] The sentence Petitioner received for each of his convictions was thus within the statutory range of permissible punishment.

The arguments asserted in ground seven, like the other grounds presented by Petitioner, are without merit. They fail to establish the prejudice required for an ineffective assistance of counsel claim and they fail independently to provide a basis for relief in this habeas proceeding.

RECOMMENDATION

For these reasons, it is recommended that the petition for a writ of habeas corpus be denied. Petitioner is advised of his right to file an objection to this Report and Recommendation with the Clerk of the District Court by June 22, 1999, in accordance with 28 U.S.C. §636 and Local Civil Rule 72.1. The Petitioner is further advised that failure to make timely objection to this Report and Recommendation waives his right to appellate review of both factual and legal issues contained herein. Moore v. United States, 950 F.2d 656 (10th Cit. 1991). This Report and Recommendation disposes of all issues referred to this Magistrate Judge in the captioned matter.

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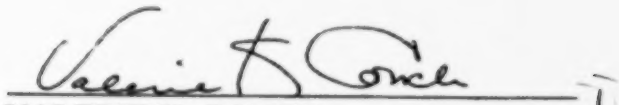
[21] Section 450.8 sets forth the punishment to be "imprisonment in the State Penitentiary for not more than five *(5)* years. . . ." Because Petitioner had been convicted of a prior felony, Okla. Stat. tit. 21, *§51* applies and provides for "a term not exceeding ten (10) years."

ENTERED this 7th day of June, 1999.



VALERIE K. COUCH
UNITED STATES
MAGISTRATE JUDGE